UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK (BROOKLYN)

GOVERNOR ANDREW M. CUOMO, Movant, v. THE NEW YORK STATE ASSEMBLY JUDICIARY COMMITTEE, Respondent.	Case No. 1:22-mc-03027-LDH-TAM
GOVERNOR ANDREW M. CUOMO, Movant, v. OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL, Respondent.	Case No. 1:22-mc-03044-LDH-TAM Brooklyn, New York February 7, 2023 11:06 a.m.

TRANSCRIPT OF ORAL ARGUMENT HEARING
BEFORE THE HONORABLE TARYN A. MERKL
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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(Call to order at 11:06 a.m.)

THE CLERK: This is oral argument for docket 22-MC-3027, Cuomo v. The New York State Assembly Judiciary Committee and docket 22-MC-3044, Cuomo v. Office of The New York State Attorney General.

Will the parties please state their appearances for the record starting with the Movant?

MS. TRZASKOMA: Good afternoon, Your Honor, Theresa Trzaskoma from Sher Tremonte on behalf of Governor Cuomo.

THE COURT: Good morning.

MS. GLAVIN: Rita Glavin, Glavin, PLLC on behalf of Governor Cuomo along with Allegra Noonan, who's with Sher Tremonte.

THE COURT: Good morning.

MR. ANDRES: Good morning, Your Honor, Greg Andres, together with Mike Scheinkman, David Toscano on behalf of the Judiciary Committee of the New York State Assembly. Good morning, nice to see you.

THE COURT: Good morning. You, too.

MR. AMER: Good morning, Your Honor, Andrew Amer on behalf of the Office of the Attorney General with my colleague Serena Longley, also with the Office of the Attorney General.

THE COURT: Good morning.

So we are here today for oral argument on two on motions that were initiated originally by former Governor Cuomo

to seek documents from both the Assembly Judiciary Committee and the Attorney General's Office in connection with the investigations that were undertaken by those two entities.

Obviously, the arguments have some overlap, but there's also some significant differences in my assessment as to the, you know, arguments being made by each of the respondents to the subpoenas.

So I would like to sort of inquire about how we should best structure this. Obviously, the Movant has the initial burden to establish relevance and you are -- you initiated the motion.

So I was anticipating we could start with you and hear argument from one of the entities in response and then, you know, move to the second entity.

I don't know if the parties have discussed sort of who would like to go first in terms of the Respondents. Has there been any discussion along those lines, Mr. Andres?

MR. ANDRES: No discussions, Judge.

THE COURT: Okay. Well, I'm inclined to just do it in docket order then if it doesn't matter to the parties. So I think we should do the Assembly Judiciary Committee first if that's acceptable.

And I'd like to start by hearing from the Movant since it is your opening motion.

MS. TRZASKOMA: Yes, thank you, Your Honor. Is it

all right if I sit? My eyesight is --

THE COURT: Yes, I think the mics pick you up a little bit better, but it's your decision. Whatever's more comfortable.

MS. TRZASKOMA: So, you know, I just -- a starting point, we submitted a letter to Your Honor this week reflecting an update on Governor Cuomo's Article 78 proceeding, which was pending in state court. That was a challenge to the Attorney General's denial of Governor Cuomo's request for a public funded defense under Section 17 of the Public Officers' Law.

Last the Court heard argument and ruled in that -- in Governor Cuomo's favor in that matter. And the Attorney General has now certified Governor Cuomo for a publicly funded defense in connection with the Trooper 1 action.

And I mention that because I think it goes to some of the efficiency and burden questions. The taxpayers are paying for all of this.

And so, I think there really should be consideration of the efficiency arguments and taking into account, you know, the burden on the public as well.

So, you know, we are here because we served Rule 45 subpoenas on both the Assembly Judiciary Committee and the Attorney General's Office seeking documents as Your Honor noted. And the Assembly Judiciary Committee has refused to prove produce anything.

As Your Honor saw, and from their discovery responses, they agreed to meet and confer with us. But ultimately through those meet and confers, it was clear that there was nothing that they were willing -- that the Assembly Judiciary Committee was willing to produce.

And the same thing with the Attorney General's Office, they agreed to produce what I now think is four documents, those that specifically reference Trooper 1's name.

So, you know, I'm going to really focus. First, I can start with the Assembly Judiciary Committee. I think some of the issues are the same.

And we can start with sovereign immunity. So that is the -- a new argument that the -- both the Assembly Judiciary Committee and Attorney General have made in connection with their motions to quash. There was no --

THE COURT: Before we actually get to motions to quash, I'd like actually to hear your argument on your motion to compel.

I mean, is it fair to characterize your subpoena for the AJC as basically seeking everything that they generated, received, or communicated in connection with this investigation?

MS. TRZASKOMA: Yes, Your Honor, we are seeking -- so to go high level to Trooper 1's complaint, as Your Honor knows, her complaint I would say it's divided into two halves.

And we didn't draft Trooper 1's complaint. We didn't, you know, we're not -- we didn't choose the lawsuit that has been filed against Governor Cuomo.

But in Trooper 1's lawsuit, she has two, you know, she has the allegations relating to her, which is about half of her allegations.

And then, the remainder are allegations related to other claimants, who are reflected in the reports issued by both the Judiciary Committee and the Attorney General.

THE COURT: But aren't the documents about those claimants publicly available at this point on the Office of the Attorney General's website, the transcripts that are quoted and things?

MS. TRZASKOMA: There are some materials, but far from everything. I mean, really from everything.

So the Attorney General selectively released approximately 42 transcripts. Those were transcripts that the Attorney General decided, you know, on the record testimony that the Attorney General decided to take. There were 179 witnesses.

THE COURT: I'm not asking about those witnesses. The persons who are cited in the complaint, aren't those transcripts and materials for those individuals largely available on the Office of the Attorney General's website?

MS. TRZASKOMA: The -- so Ms. Glavin can probably

respond.

MS. GLAVIN: So, Your Honor, the transcripts of 41 individuals, redacted transcripts, are available on the Attorney General's website, along with redacted exhibits.

What we do know, okay, is that for instance for the 11 complainants, for example, we know that some if not all of them were -- had interviews with the A.G.'s Office informally, and that is reflected in interview memos, before those complainants were put under oath for formally transcribed interviews.

The reason I know that is because when Governor Cuomo was charged with a misdemeanor in Albany County, the Attorney General had to give the Albany County District Attorney's Office some of that discovery, including interview memos relating to other complainants.

But what you have on the Attorney General's website is what the Attorney General's Office decided was in their view relevant to release.

So you don't have, like for instance if you look at the Attorney General's report, just with Trooper 1, okay, the Attorney General references, and I can refer Your Honor say to page 40 of the report, two incidents that are referred to in Trooper 1's complaint.

And the Attorney General talks about having interviewed other troopers unnamed in connection with those

incidents, which then appear in Trooper 1's complaint.

We have an idea who a couple of them are, but not all of them. And all of -- those people were not all put under oath.

So what -- how the investigation played out is that the Attorney General at some point made a decision on who they were putting under oath and who they weren't.

But the report relied on both the informal interviews that were never transcribed or put under oath, as well as dozens of informal interviews. They are referenced throughout the report and they were never publicly released.

THE COURT: Right, but do you have a sense of whether or not there's any real relevance with regard to dozens and dozens of those interviews as to Trooper 1's allegations because --

MS. GLAVIN: Absolutely.

THE COURT: -- the reason that I'm obviously asking these questions is the scope of your request is extremely vast. And I question whether or not you've actually established relevance quite frankly --

MS. GLAVIN: Okay.

THE COURT: -- with regard to the motion to compel as to everything.

There may be some things that are relevant, but the wide swath of 73,000 unredacted documents seems extraordinarily

broad, not to mention the -- in inter -- you know, inner office memos with other agencies and all of the communications, communications with counsel.

I mean, it's -- I mean, extraordinary volume and really inconsistent with Rule 26's proportionality and relevance.

So that's the baseline concern. And so please, you know, kind of try to frame your arguments in that vein.

MS. GLAVIN: Yes.

THE COURT: Generalizations are not going to work in terms of establishing relevance.

MS. GLAVIN: Okay.

MS. TRZASKOMA: Well, I mean, just to take an example from the Assembly Judiciary Committee's documents. And I get that we're, you know, we're now -- they're connected, but they interviewed Trooper 1.

And that interview -- you know, so there's been a subsequent -- there are subsequent statements by Trooper 1. There are subsequent statements by other complainants.

And you know, I mean, I don't know if what -- if Your Honor was trying to suggest that only documents related to Trooper 1 are relevant to her claims.

I mean, if there's a ruling that the allegations related to everyone else are not part of her lawsuit, that would be great, but they're in her complaint.

There's probably going to be some motion practice at some point about whether those complaint -- you know, the admissibility, the relevance, but we're not there yet. And part --

THE COURT: I agree with you. And I did not intend to imply that. In fact, I asked specifically about the individuals named in the complaint. I did not limit my question to Trooper 1.

MS. TRZASKOMA: Understood, Your Honor. And I did -- I probably misunderstood.

So, you know, the fact that there are witnesses -- there are for example, unidentified claimants. There are people whose identities, you know, who made claims, who are in Trooper 1's complaint as state entity number -- state employee number 2 and state employee number 1. We don't know who those are in one instance.

And so, the state -- I mean, without question statements made by those complainants, statements made by witnesses who are interviewed about events.

For example, witnesses were -- Trooper 1 alleges that Governor Cuomo touched her on the back as they were riding up an elevator to his office.

There were others troopers who were in the elevator. There were troopers who were outside the elevator. There were troopers who heard things.

Those troopers are referenced in the A.G.'s report, but they are not -- their statements have been not been made available to us, nor their identities.

And there are other examples like that. As Ms. Glavin pointed out, just the -- if you read the Attorney General's report or the Judiciary Committee's report, there are multiple footnotes that reference others, you know, other witnesses who said things.

And the Attorney General's investigation was about the sexual harassment allegations. If there are documents that don't relate in any way to the allegations that are in Trooper 1's complaint, which are pretty much, you know, a mirror image of the A.G.'s report, then you know, if they're truly irrelevant, we don't need them, but we're a little shooting in the dark because we don't know who, you know, the -- we don't know what is in the 73,000 pages of -- 73,000 documents.

It's entirely possible that we don't want all of that. But at this point, we have -- I -- the documents that we have requested are relevant.

Who the Attorney General and who the Assembly Judiciary Committee subpoenaed are relevant. It will be incredibly helpful to know who has been spoken with, who has produced documents.

What -- we should not have to re-invent the wheel of the two investigations that have already been done on, you

know, taxpayers' dime. And that's essentially what the Attorney General's opposition says is you can go do this yourself.

THE COURT: But isn't that always the answer from a law enforcement entity when they've conducted an investigation? If you were to subpoena the U.S. Attorney's Office for everything that they have done in connection with an investigation, what do you think you would get back?

MS. TRZASKOMA: Well, Your Honor this is not a law enforcement investigation. To be clear, the Attorney General's investigation --

THE COURT: One of the privileges they're claiming. Answer my question.

MS. TRZASKOMA: Well, I think that the U.S. Attorney's Office would have all sorts of grand jury secrecy --

THE COURT: Fine, the Kings County D.A., same question?

MS. TRZASKOMA: Or they might have also grand jury secrecy issues that they, you know, are current investigations.

THE COURT: Doesn't the executive law actually include a secrecy provision in 63.8?

MS. TRZASKOMA: It has a confidentiality provision, but it is not -- it is -- it all leads to a public report. That -- so it's confidential while it's going on, but the idea of 63.8 is that it is an investigation into a matter of public

concern that is statutorily required to end in a public report.

THE COURT: Do you have any source of authority that specifically states that because of 63.8's differences as compared to traditional law enforcement investigative agencies, such as District Attorney's Office, that the secrecy or law enforcement privileges is different for them?

MS. TRZASKOMA: Well, I don't think it's the same including because --

THE COURT: My question is do you have authority?

MS. TRZASKOMA: I have the statute, Your Honor, which says that the subpoenas that the A.G. can issue pursuant to 63.8 are to be issued under the CPLR, the Civil Practice Rules and Laws.

So it's not a law enforcement investigation. It is a particular investigation that is to be conducted pursuant to the CPLR. It can -- it is done in confidence, but it leads to a public report.

THE COURT: But doesn't -- I mean, I find it fascinating that it actually created a crime to disclose the persons who are interviewed in connection with the investigation.

I mean, given that level of protection that the legislature was entrusted in affording persons who are asked to provide information, is there a source of authority to suggest that once it's over, all that information becomes public?

MS. TRZASKOMA: Well, I think the Attorney General's Office has admitted that it becomes public. And the Attorney General --

THE COURT: Not everything. They certainly have not admitted that everything becomes public.

MS. TRZASKOMA: No, but they state -- she -- the Attorney General stated her intention that to make it all public. That she ultimately did not make it public, it is not, you know, that's just selective disclosure. She could have made everything public.

And she said she was going to. And she -- and then she didn't. There is no prohibition on disclosure, particularly not in the context of a proceeding like this, where I mean, confidentiality obligations exist all the time and that's why we have protective orders and that's why Your Honor entered one in this case. And it's why documents could be produced pursuant to protective order. They may be -- they remain confidential.

And you know, Your Honor or another court might determine that all of that information should remain under seal pursuant to a showing, but it's not a basis not to give us the documents.

THE COURT: My question is do you have an authority that differentiates the privileges that may attach? That's the question.

MS. TRZASKOMA: I don't think there's any case that says that this material needs to be -- or is undiscoverable pursuant to some law enforcement privilege, but I think if you look at the purpose of a law enforcement privilege or the legislative privilege, none of those applies here, where there was not a law enforcement investigation. That's not what this was.

There were -- it was not intended -- the fact that the Attorney General did it was statutorily directed, you know, was directed to do it by the governor.

It doesn't create some law enforcement purpose where none existed. It was -- the purpose of this was not to prosecute individuals, not to investigate crimes. It was to look into a matter of public concern and issue a public report.

THE COURT: But how does that make it all public?

MS. TRZASKOMA: It doesn't -- it didn't make it public, but it is discoverable. So we're not saying it should all be made public.

What we are saying is that we are entitled to it pursuant to a Rule 45 subpoena. And there is no case that says these sorts of materials are never to be disclosed.

And once we establish relevance and proportionality, which I think at least as to the underlying interview memos, notes of communications with witnesses or their counsel, the documents that were produced pursuant to subpoena, none of

that -- I mean, that is -- none of that should be protected. I don't know what basis there is -- I mean, we can talk through the arguments, the privileges that have been asserted, but no one as far as I know has -- not even the Attorney General has asserted that, you know, because of the structure of 63.8, everything -- you know, nothing can be disclosed.

And I don't even know how that would work. So the Attorney General just had discretion what to make public and what not? We're not -- I mean, we don't live in the star chamber, right? This is like -- this is not how this is supposed to work.

THE COURT: But the question, that's why I asked you for authority, because it's very unclear how this is supposed to work.

I mean, the statute expressly includes a misdemeanor provision for disclosing the identities of persons who were called to testify, which is fascinating in and of itself in terms of the, you know, need -- the interest that the state legislature evidenced in protecting secrecy of parts of the investigation.

So whether they're asserting it or not, my question to you is really about, you know, first, you know, we've gotten far offtrack in terms of establishing arguable relevance and proportionality.

I mean, I think that 73-, 74,000 documents, however

ever many thousands of documents have been unredacted and have not yet been disclosed is so vast, that it's hard to, you know, understand how you've established relevance as to everything.

MS. TRZASKOMA: Well, Your Honor, I think it's -- it would -- it's very difficult for us to establish relevance as to everything.

But I think, you know, with what we can go down the list and I'm happy to start -- I know we've drifted from the Judiciary Committee back to the A.G.'s Office, but I -- you know, my view of the statute is that it does not prevent the Attorney General from disclosing information once the report is done and issued.

So it may impose criminal sanctions for interfering with the confidentiality of an investigation while it's ongoing, but once it concludes and it results in a public report, I don't -- there's nothing in the statute that says that it can not be discovered in the course of a subsequent litigation.

THE COURT: I agree with -- and there's nothing in the statute that says that. But you know, those are not the Attorney General's arguments as to nondisclosure.

Their arguments are based on law enforcement privilege and deliberative process privilege, which we haven't addressed.

And we had started trying to talk about the AJC, so I

understand that in terms of what's available to you, whether it's, you know, the AJC's position or the A.G.'s position is largely driven by what decisions A.G. has made in terms of putting the documents out there. And I get that.

And that's why we're talking about it in terms of the relevance question. Because I'm trying to understand if there is a universe of documents that can actually be identified with some particularity, that could potentially be, you know, relevant and sufficiently proportional that you actually could get them.

MS. TRZASKOMA: Well --

THE COURT: And saying I need all 72,000 so I can see every step they took sounds a lot like a vast intrusion into the deliberative process privilege.

MS. TRZASKOMA: Well, so I guess we're going back to just -- well, focusing on the Assembly Judiciary Committee for a moment, I don't actually know what the volume of responsive documents to our requests would be.

And -- but I think at a minimum, the communications the -- and again, the Judiciary Committee's report is more -- it's broader than the investigation that the A.G. did in terms of subject matter. There are other subjects covered in that report apart from the allegations that appear in Trooper 1's complaint.

So it's not clear to us exactly what the Judiciary

Committee did. You know, we can read the report. We know that they interviewed Trooper 1 and a couple of others. So we know that there are interview memos of that. There are probably communications with counsel.

Right, so there are -- there were interviews with Trooper 1, with Lindsey Boylan, Britany Commisso, executive assistant number 2, chamber employee number 2, executive assistant number 3, and an interview with Alyssa McGrath.

So we know at a minimum, based on what is in the Judiciary Committee's report, that there are materials that are, you know, just in the heartland of relevance for Trooper 1's claims.

And I don't know what I don't know. So, you know, I don't know what else there might be. I think I'm imagining that there are communications with attorneys for those witnesses.

There may be -- some of those may be just about scheduling, but some of them may be substantive in terms of questions. I don't know.

I don't know what documents those folks turned over, if they turned over any additional documents to the Judiciary Committee.

So, you know, that would have been a helpful thing to get out of a meet and confer, and we might have ordinarily gotten out of a meet and confer, but we hit roadblocks very

early on with both of these subpoenaed parties.

And you know, where they are taking extreme positions that they're not turning anything over and they don't have to do anything in compliance with our subpoena basically.

I mean, I get the A.G. said I'll give you everything that has Trooper 1's name on it, which turns out to be four documents. So, you know, it would -- we're -- we can do our best to articulate the specific documents.

But again, without you know, I think if there's anything that, you know, any interviews with witnesses that are relevant to any of the allegations in Trooper 1's complaint, that's relevant and it should be turned over.

THE COURT: From the Judiciary Committee's work-product specifically?

MS. TRZASKOMA: From the Judiciary Committee's work-product.

THE COURT: Okay, so you had started with sovereign immunity. Would you like to go to that?

MS. TRZASKOMA: I would -- I -- not really, but I will. So you know that study -- so sovereign immunity has been now raised by both the Attorney General and the Judiciary Committee.

And the theory is that under the 11th Amendment, state agencies are absolutely immune from federal discovery subpoenas.

I gather from reading the tea leaves that they thought of this argument after the 5th Circuit rendered its decision in Russell v. Jones, which happened in September.

Prior to that, nobody had made -- nobody had said to us the Judiciary Committee or the Attorney General's Office that they believed that they were immune.

There's no law in this circuit that supports that. Many -- besides the 5th Circuit, other circuits, who have considered it, have rejected the idea that states are immune from discovery subpoenas, that state agencies are immune from discovery subpoenas.

The one court in the 2nd Circuit to have considered it, the Jackson case, rejected the idea that state sovereign immunity protects state agencies from having to produce documents.

And I will say in my experience, I have litigated a number of cases, civil rights cases principally, where we needed documents from a state agency, a New York state agency, and we served subpoenas, and we got those documents.

The state -- I mean, it would completely up end these kinds of cases if the state agency could pick and choose when to comply and when not to comply or to do what the Attorney General's Office is trying to do here, which is to say we're immune from subpoena, but we will comply with the subpoena, but only the way we want to comply. And our decision to comply or

not comply or partially comply is not reviewable by any court. We just get to decide whether we -- whether we comply or not.

So I don't think there's any law to support, you know, beside the outlier 5th Circuit case. I think it's not consistent with what I understand, you know, what the cases talk about in terms of the purpose of the 11th Amendment.

And that's particularly true in this kind of case where the state, you know, the taxpayer dollars are at issue for all of this and where not responding to our subpoena's actually going to increase the burden on the taxpayer.

THE COURT: Well, it depends. I mean, if they truly do need to do redact the documents and do various things to prepare them, I mean, we're talking about hundreds and hundreds of hours of attorney work.

MS. TRZASKOMA: Well, so I'm not even -- I'm not sure that they need to redact them, frankly, because my understanding is they were redacting them for public disclosure.

Here, we're not -- there's a step in between that. Producing them to us, there's a protective order. They can produce them to us pursuant to protective order.

The documents can be made -- can be designated confidential. They can be treated confidentially. And again, they can be, you know, to the extent there's any confidential material in there, any personal identifying information, any

particularly sensitive health information, that can all continue to be shielded from the public and you know --

THE COURT: I would think that they would argue, as they have, that they also would like to shield that from the former governor to the extent it is truly private and irrelevant information.

MS. TRZASKOMA: Well, I think that the problem we run into is with what's relevant or not relevant. And I --

THE COURT: The examples you just gave strike me as important. You have private sensitive medical information, health information, personal identifying information.

MS. TRZASKOMA: Well, I -- so I think some of that probably is irrelevant, but some of it may be relevant. I don't know. I can't give you an example because I don't -- but I can image situations where someone, I don't know, like admitted that they had a drinking problem and that they were drunk everyday they went to work.

That would certainly affect the credibility of that witness. I would consider that to be highly personal, sensitive information, but hugely relevant to the credibility of that particular witness.

So I'm not saying there's anything like that out there. I can't imagine that, but I don't know what I don't know. And so, you know, I do think we have a problem letting the Attorney General just decide, you know, what is -- I mean,

without logging it, without telling us what kind of information it is, it's very -- it's very difficult.

MS. GLAVIN: Your Honor, on the issue of the redactions, you know, if it might be helpful to the Court, on interview memos, what I can say is what we have already seen in interview memos from discovery we got from the Albany County District Attorney's Office.

So we got maybe, I don't know, 25 to 30, I think, interview memo -- in that range. And the redaction of those interview memos are what you see like with an FBI 302.

THE COURT: Uh-huh.

MS. GLAVIN: So what I've seen is they will have at the end of those memos what the investigators did was they would cross reference like, okay, they named this, you know, persons discussed during this.

That was like an easy redaction. It's what you see like in a DEA-6. So at the bottom, they routinely redacted that information. There wasn't that much more that I'm remembering being redacted in the memos except maybe the intro part.

And these look -- these memos look like an FBI 302, except done by a law firm.

THE COURT: Uh-huh.

MS. GLAVIN: Most of what's in there is factual and I don't think that it is a terrible burden. If the Court wants,

you know, we're happy to give some examples so you can get sense of what that would be.

I do think that probably what took the most time, again, I'm not focused on the is Assembly Judiciary Committee, but what the Attorney General released. My personal opinion is what took the most time for them and these, you know, they said it took five months.

I think it was the redacting of the transcripts, because there were decisions made if things were going to be publically released.

Like for instance, I know in one witness' testimony, there were three or four whole pages redacted. Because I think they didn't want that out -- for whatever reason, they didn't want it out publicly. It was incredibly relevant to some of the arguments I think the Governor would make about why a complainant wasn't reliable.

But I think a lot of the time that they spent redacting had to be the redacting of exhibits. Like they attached some text messages from complainants. You know, and I think there might have been stuff, you know, interspersed that was personal.

But I think for what we're looking for in terms of the transcripts is we are looking for unredacted transcripts, which would be their full testimony.

We are looking for in terms of the interview memos,

we have 179 witnesses were interviewed, okay. But of those 179, some of them were interviewed multiple times.

And it ended up with a transcript at the end. So they would have an informal interview, and then, there would be transcribed testimony. We're looking for, you know, all of those interview memos.

To my knowledge, I mean, I don't know what -- what we would have loved and I think that Ms. Trzaskoma got at this, was to have a meaningful meet and confer because I think we could have narrowed this down.

The problem is we don't know who the 179 witnesses are. How many troopers did you interview because I see throughout the report interspersed, you see P.S. we talked to other PSU members. We spoke to other troopers who said X, Y, Z, but we don't know who all those people are.

It would have been great to get a chart from the A.G.'s Office to us saying here are the 179.

With respect to the 79,000 documents, you and I know, Mr. Andres and I know, I bet a ton of those documents are things like phone records that are toll records that may or may not be meaningful as to who had phone calls when.

I bet a lot of the 79,000 documents were emails actually that the executive chamber provided to the A.G.'s Office. I think they got thousands of emails.

If we could sit down, you know, and they would say to

us, look, of the 79,000, here are what these 11 complainants provided us. Here are what witnesses to the following incidents that are referred to in Trooper 1's complaint provided us, you know, all the text messages, et cetera.

You know, I'm guessing they probably don't have people's bank records in there, but I think a lot of the $79,000 -- 79,000 documents are emails, you know, various phone records. I know a lot was provided by the executive chamber.

So it's not an issue. When we say we want everything, our fear was we didn't want do give anything up because we didn't know precisely what they had, but we do know core materials that are relevant that we do absolutely need to be able to defend our client in this. And all of this can be covered by protective order.

With respect to the Assembly Judiciary Committee in terms of like the materials, I can just tell from reading from the report, I mean Your Honor can take a look at pages -- I mean, just look at the footnotes.

You know, I was focused like on, you know, the Trooper 1 Davis Polk interview, it's cited dozens of times in the footnotes. Look at footnotes 46 to 49 and then 93 to 120. See how many times her interview with Davis Polk is cited in reliance on the report.

I can also see in the footnotes, you know, other interviews that Ms. Trzaskoma just mentioned. If all the

Assembly Judiciary Committee did was a handful of interviews that are cited in the report, and they didn't gather documents beyond that, other than what they got from the A.G.'s Office, then it's a pretty narrow universe that we're talking about here.

We just don't know that. And we would have liked to have narrowed that down, but my guess is that the Assembly Judiciary Committee largely took what they got from the A.G.'s Office, did some extra stuff, and then wrote the report.

One thing also I'd like Your Honor to focus on with Assembly Judiciary Committee in terms of narrowing it down, look at page 16 of the Assembly Judiciary Committee's report because this is what sort of we're interested in.

What the report said is quote after interviews with relevant witnesses and the independent review of tens of thousands of documents, including emails, text messages, Blackberry pin messages, photographs, recordings of phone calls social media accounts, materials from prior litigation, video records, interview memos, deposition transcripts, and other relevant materials, we find, you know, blah, blah, blah, that the Government engaged in harassment.

Those are the materials that Davis Polk and the Assembly Judiciary Committee deem to be core to their conclusions.

That's the stuff we want, too. And who are the

people that they did the interviews with? We know there's a handful, but did they just simply get what the A.G.'s Office provided? So that's what we're looking for and we would have loved to have narrowed it down. And that was our goal.

THE COURT: Okay, so I've heard your argument on the sovereign immunity, but I'm not sure who's handling on your side the question of the legislative privilege or if we want to give Mr. Andres a turn and then you can respond to his legislative privilege argument?

MS. TRZASKOMA: Well, I think -- you know, if we've satisfied Your Honor, that we're you know, A, what we're seeking are relevant materials, and B, that we -- you know that we -- we've been willing to narrow the requests, you know, once we have an understanding of what it is that exists, I'm happy to let Mr. Andres and Mr. Amer articulate their, you know, theories of why they should not have to produce anything.

THE COURT: Well, I mean I just -- just like -- as you have already alluded to, Ms. Trzaskoma, it's difficult for the Court in every one of these discovery disputes, and this is no exception, to you know make a finding or a ruling based on a body of documents that I haven't seen.

And so, these are always very tricky inquiries. And so, you know, part of why I was asking you for more precision in your requests is because it does seem extremely vast and broad. And I can imagine a subset of documents that would be

highly relevant to the case.

But you know, every single email with counsel for every single witness is beyond the pale. I mean, there's no way you need scheduling emails and it's a huge of waste of everybody time. So, you know, to even look for them.

So, you know, there's certainly categories of things that aren't relevant in your requests. And because there are things within your categories of requests that aren't relevant, it's hard for me to suss out what would be relevant and then to evaluate the applicable privileges as to those specific subcategories.

MS. TRZASKOMA: Well, just to, again, go back to our requests were broad, again, because we don't know what, you know, what exactly is out there.

But we have an idea that there might be relevant, helpful documents in those categories, broad categories of information.

If something if truly irrelevant, scheduling, bank records, you know, I don't know what is truly irrelevant, but if it's irrelevant, that's not what we're asking for. We're asking for --

THE COURT: But you did that -- and that's the motion that I'm being asked to rule on.

MS. TRZASKOMA: Well, Your Honor, we did ask for documents that relate to the claims that have been made. And I

think it may be that we asked for some -- the categories have both relevant and irrelevant documents. It doesn't mean that we didn't serve a subpoena that asked for relevant documents.

It calls -- these subpoenas call for the production of relevant documents. And you know, again, there -- it's not like in any category, you can just say that whole category is irrelevant.

There -- we crafted those requests to capture the relevant information and if there are substantive communications between the investigators and witnesses or their counsel, those would fall into those, you know, the communications that we've requested.

THE COURT: I understand your argument.

MS. TRZASKOMA: Yeah.

THE COURT: I understand.

Mr. Andres, you've been very patient.

MR. ANDRES: Which is not my strong suit, Judge. So thank you. So just a few things. And I'll try to be brief. There's obviously been significant briefing here.

I'm going to talk about the -- among the basis that we think that you should quash the subpoena and grant the -- grant that motion whether it's the 11th Amendment, the legislative privilege, and if you need to get there, the attorney-client privilege.

But let me just, if I could have a minute to step

back and talk about some facts, which I think Mr. Cuomo has simply misstated.

First, the underlying lawsuit by Trooper 1 is not about the Judiciary Committee's report. That report's not going to be admitted as evidence in this trial. It's hearsay. It's cited once in her complaint. In one paragraph, it's cited.

What's going to happen in this case is what happens in every case. There is going to be party discovery and other third-party discovery that doesn't upset sovereign immunity or legislative privilege or the attorney-client privilege.

There are going to be witness lists and depositions. And presumably Trooper 1 and maybe even Mr. Cuomo will be deposed and questions about what happened in the Governor's conduct will be determined.

This is not a case about the Judiciary Committee's report. And I would argue that it's not relevant.

Now, again, Mr. Cuomo contends that the amended complaint is quote unquote based on the Judiciary Report and that's false.

There's a reference to the report in the amended complaint. Mr. Cuomo says the Trooper 1 lawsuit relies heavily on the AGC report. That's not true.

It says that the AGC -- AJC or the Judiciary Committee report is at the heart of the litigation. That's not

true.

Mr. Cuomo's actions are at the heart of the litigation, certainly something that he's aware of.

Mr. Cuomo goes so far as to accuse the Judiciary Committee of launching a public grenade that triggered Trooper 1's lawsuit.

Now that is, stepping back, sort of amazing in attempt to re-write history that somehow the Judiciary Committee in exercising its constitutional obligations to investigate the possible impeachment of the Governor somehow triggered Trooper 1's lawsuit here.

And, again, Mr. Cuomo says that the Judiciary Committee deliberately invited its own participation in litigation, all of which is patently false.

The third fact that I just wanted to highlight is that throughout Mr. Cuomo's briefing, he says that the purpose of the investigation was simply to publish a report.

And that also is not true. The Speaker mandated that there be an impeachment investigation, which continued after Mr. Cuomo's resignation because the issue about whether an official could be impeached after he left office whether Mr. Cuomo or former President Trump is one that's not decided necessarily.

There's only been one impeachment of a governor in the state of New York. So, after Mr. Cuomo resigned, there was

certainly a need to continue to investigate that issue notwithstanding the fact that there's also been legislation and the like.

And then lastly --

THE COURT: Can I ask you a question about that point?

MR. ANDRES: Sure.

THE COURT: So, you know, what evidence or information is the Court even permitted to consider to evaluate whether or not something falls within the legislative sphere?

MR. ANDRES: Well, if you get through the first quote unquote roadblock of sovereign immunity, yes, I think Your Honor could end this case very quickly relying on sovereign immunity.

But turning to a legislative privilege, you know, arguably that privilege is absolute, right? Arguably, after the NRP case, it's absolute. And the Court shouldn't look in or need to look into that.

Here, there's really no question that impeachment is a core legislative function that the Speaker directed the Judiciary Committee to engage in an impeachment inquiry.

Beyond that, there's the oversight of the executive, that the legislature's also charged with doing.

And lastly, there's actually been legislation. So there's been legislation, there's been discussion of

constitutional amendments.

I think the Schiff case, where Judicial Watch tried to get, I think, the subpoenas relating to the impeachment investigation by the House of Representatives is a good precedent. We're not talking about anything other than what is core legislative functions here by the Judiciary Committee.

THE COURT: But how am I even supposed to make a determination? Like what -- I'm literally asking like what body of information or evidence can the Court even look to, to decide what the legislature was up to?

I mean, they've -- people have submitted public speeches. People have submitted newspaper articles. You know, what is the body of information that I can look to decide whether or not something is legislative activity?

MR. ANDRES: Well, I think for starters and maybe for starters and the end of the inquiry is that you look at the Speaker's mandate.

The Speaker mandated the Judiciary Committee to engage in an impeachment investigation. And then, to continue it after the Governor's resignation. That is the end of the inquiry.

This is a legislative function. And again, you know, courts have held that that is the some cases absolute.

To the extent that there -- to the extent that it's not absolute, which we don't agree with, you know, the Court

would then turn to the Rodriguez factors, which I think overwhelmingly -- a review of those factors establish that no disclosure is appropriate here, right? Those factors include whether it's relevant. We've talked about that.

The Governor himself had said that -- in a sworn affidavit, the Governor has said that the entirety of the -- of Trooper 1's complaint is based on the Attorney General's report, A.

And B, for the reasons I've said, the Judiciary Committee's conclusions and the findings are not relevant for this investigation.

The second factor in the Rodriguez analysis, I believe, is whether or not you can get this material from other sources.

Obviously, the legislature issued subpoenas and obtained information from other sources, the same way that Mr. Cuomo can from the state police or other entities that aren't subject to the legislative privilege. And certainly they can pursue those. So the second factor whether or not there are other available sources is relevant.

The third factor, whether this case is serious or extraordinary, of course, it's a federal case and we know federal cases are serious.

And obviously, not to dis -- to suggest that the Governor's treatment or alleged treatment of Trooper 1 was not

serious, but this not an extraordinary case that has public harm.

It's not a case about redistricting. Or it's not a case that outside of the parties here, which again I don't mean to minimize, it doesn't fall in the category of an extraordinary case. So those are the first three factors, which all favor or disfavor disclosure here.

The fourth factor is whether the State is involved or is a party, the Governor's a party. The Government is not categorically a party here.

So each of those first four factors favor the Court not disclosing any of the material that's subject to the legislative privilege.

The fifth factor, which by the way, doesn't matter if you find that the first four factors weigh in favor of nondisclosure, the fifth factor relates to the chilling effect that might occur based on disclosure.

And there can be no question that an impeachment investigation here of the Governor, that invading legislative privilege to a lawsuit would prejudice a legislature's ability to gain testimony from relevant witnesses.

So, again, Judge, our view is this is core legislative activity. The Speaker's mandate is enough for the Court to rule that this is core legislative activity.

Obviously, impeachment is something that's -- is a

duty of the Assembly. So it ends there. We believe that the privilege is absolute. And even if it isn't and you go to the Rodriguez factors, we win there, too.

So that is the issue with respect to legislative privilege. And whether or not Mr. Cuomo somehow threads the needle that there's a difference between legislative immunity and legislative privilege is really of no moment here because the cases that refer to one also refer to the other and both are -- basically come from the speech and debate clause.

So there's really no meaningful difference here whether you're talking about legislative immunity about whether or not somebody can be sued or legislative privilege in terms of what you can hold back in terms of documents because they merge.

If I could just take one more moment and address the issue of sovereign immunity? Because again, I think, Your Honor, what's been viewed as either an extreme position by Mr. Cuomo's counsel or a quote unquote roadblock is longstanding Supreme Court precedent with respect to New York sovereign immunity, which in effect bars the subpoena for Mr. Cuomo.

So the Dugan case, Dugan v. Rank, the Supreme Court's decision is not new to anybody. It was decided in 1963. And it holds that sovereign immunity bars any action in which a judgment would expend itself on the public treasury or domain or interfere with the public administration or if the effect of

the judgment would be to restrain the government from acting or to compel it to act.

Judge, if you look at the last five words of that Supreme Court precedent, that the State of New York can't be compelled to act, we're talking about a case in which Mr. Cuomo is seeking to compel them to comply with the subpoena. So that case is not new.

And to the extent that sovereign immunity wasn't raised in the meet and confer or previously, it's jurisdictional. And it can be raised at any point. So the Dugan case is step 1 in the analysis.

THE COURT: But it certainly can't be your argument that New York can never be compelled to act. And the ex parte Young doctrine, for example, makes clear that individual officers of the state and folks working on behalf of the state can be compelled to act in an injunctive capacity. Isn't this more analogous to some sort of prospective relief of a kind anticipated by ex parte Young and less about compelling the state to do something different?

MR. ANDRES: No, I think there are whole number of areas where the State has waived sovereign immunity.

And counsel talked about civil rights cases. That's a good example. If there are constitutional issues, there are certainly instances where the State has waived affirmatively their sovereign immunity, but this is not that case.

THE COURT: Well, what about, I don't know if you read this one, the Arista Records case, involving Virginia Technical University?

So in that case, Arista Records tried to seek information from Virginia Technical University about basically who was, you know, infringing on their IP rights, who was using which IP addresses when to download music, right?

And Virginia Tech is like, no, you know, sovereign immunity, we're a state institution.

SUNY institutions and all agencies of New York State would not be subject to private lawsuit for any information under your theory?

MR. ANDRES: I'm not suggesting that, Judge, because there are instances where whether it's the -- I think the -- Mr. Cuomo cites a case relating to the New York Pension Board and there are a series of cases involving the D.A. so -- or D.A.s. So sovereign immunity doesn't always -- isn't always applicable.

But certainly in this case, with respect to the New York State Assembly, I think it is applicable. And if you look the G.E. case, which is stage 2, the G.E. case is a 2nd Circuit case that basically precludes the enforcement of a subpoena against the federal government.

So in the first instance, you'd have the Dugan standard. And then, you have the G.E. case. And basically

holds at the end of the day, that the State can neither be sued nor can be compelled to produce documents pursuant to the Dugan standard, which again, has been applied by various courts and is not new.

Mr. Cuomo wants to you believe that there is no case that holds that the New York State Assembly isn't subject to a federal subpoena.

The truth of the matter is that the application of the precedent that we've cited in Dugan and G.E. in a case called MBTE, the natural application of those precedent leads to that conclusion.

And notably, there's no case on the other side either. There's no case that says that a private plaintiff is entitled to the relief of compelling the production of a subpoena by assembly.

THE COURT: But I mean, not in this circuit potentially, but the 8th Circuit, the 7th Circuit, the 1st Circuit, you know, the other circuits have recognized that private subpoenas may be enforceable against state entities.

I mean, what is the outer limit because, you know, the distinction that you're drawing with between D.A's offices or D.A.'s officer weird creatures, right? They're both statutory and they're also local authorities. And so, the D.A.'s offices are kind of in their own category.

But you know, would SUNY institutions not be subject

to suit if somebody needed information from an institution with regard to a private lawsuit?

Would, you know, what would be the outer limit? Is your argument because they are a core governmental entity, that that they are -- that they get some sort of extra sovereign immunity or would this apply to every agency in New York State?

MR. ANDRES: Well, Judge, respectfully, I'm not representing SUNY or any of the -- or the D.A.'s offices. I will say that the cases that Mr. Cuomo cites relating to the D.A.'s offices are not state officials. And so, sovereign immunity didn't apply there.

In fact, all of the cases they cite don't relate to sovereign immunity. It wasn't raised in those cases. So again, I'm not --

THE COURT: But the rule you're advancing is broad. And I'm trying to understand the outer limit.

MR. ANDRES: Yeah, the rule that I'm advancing as it relates to the New York State Assembly depends on the Court's ability to require the New York State Assembly to compel it to respond.

And that's, I think, the essence of sovereign immunity that the federal court cannot be commanding the State of New York to act in the way that it's being asked to with respect to the subpoena.

THE COURT: As a branch of government, is the

legislature differently situated from your friends at the end of the table from the A.G.'s Office?

MR. ANDRES: I think, Your Honor, in the briefing, and again, I don't -- I'm not sure this is relevant to us. So I'm happy to yield, but I think there are some arguments in the briefing that differs as it relates to an argument from Mr. Cuomo about whether sovereign immunity has been waived by the Attorney General's Office. And I'll certainly yield to that.

But as it relates to the Judiciary Committee, they have not waived sovereign immunity. They have absolutely not waived sovereign immunity.

In fact, it's not clear that the New York State Assembly has the ability to even waive sovereign immunity itself because the State has to expressly waive it. And obviously, the Judiciary Committee or the Assembly is only one part of the government of the State of New York.

But as it relates to the New York State Assembly and the Judiciary Committee, we have not waived sovereign immunity.

THE COURT: Are agencies different from branches of government --

MR. ANDRES: Your Honor, could I just have --

THE COURT: -- for purposes of this question?

(Counsel confer)

MR. ANDRES: I'm sorry, Your Honor.

THE COURT: Are agencies different from branches of

government on the sovereign immunity question? Because in the Russell case, you're dealing with the judicial branch and officers of the judicial branch arguably. There's one way to cabin that case. But would the -- are you in different situation than SUNY and the A.G.'s Office?

MR. ANDRES: Again, I --

THE COURT: Not throwing your friends under the bus.

MR. ANDRES: No, no, no.

THE COURT: They get it.

MR. ANDRES: Look.

THE COURT: This is oral argument.

MR. ANDRES: I think that as it relates to the legislature to have a court either compel the New York State Assembly to act, it sort of goes to the core of what sovereign immunity is.

Not just from the 11th Amendment, but before the Bill of Rights. It's sort of an -- it's sort of crucial to our organization of our states and our government.

So, my argument, again, as to the New York State Assembly is that the Court cannot compel it to respond to the Governor's subpoena.

THE COURT: Okay. Is there anything else you'd like to add before I hear them respond?

MR. ANDRES: I would just say, Your Honor, and just to -- so you can finish me off, the third obviously quote

unquote wall or roadblock is the attorney-client privilege.

And there's been briefing about the fact that somehow the publication of the Judiciary Committee's report waives the privilege, but the Van Bulow (phonetic) case holds fairly clearly in the 2nd Circuit that in the absence of using that document as a sword if you will or in litigation, that absent doing that, that there is in fact no waiver of the attorney-client privilege.

And so, because the Judiciary Committee hasn't used that document to its advantage in some litigation, there hasn't been a waiver.

There's obviously also been quite a bit of argument -- I -- it seems like and I'm exaggerating here, but the -- but Mr. Cuomo cites at least 150 times the fact that the Judiciary report has been made public is somehow a waiver of the legislative privilege and that too is wrong as a matter of law because confidentiality is not an aspect of the legislative privilege.

Obviously, legislatures, and we want them to act in the public. And when they publish a document, it doesn't make it somehow there's no waiver and that's consistent with the Favors case that's cited as well by the -- by Mr. Cuomo.

The fact that there's been a publication and nobody should be surprised by that by the legislature clearly doesn't waive the legislative privilege.

If I could just have one moment, I'm sure somebody will tell me I got something wrong. So, Judge, just --

(Counsel confer)

MR. ANDRES: Yeah, just as to the Younger case that you mentioned, I think that deals with individuals as opposed to an institution might be the judiciary.

But with that, Judge, thank you for your time. I'm happy to -- again, to answer any questions.

THE COURT: One more question. In evaluating, you know, what is kind of core -- back to a question about core legislative function, in the Doe v. McMillan case, the Supreme Court observed that members of Congress may frequently be in touch with and seek to influence the executive branch of government, that this conduct though generally done is not protected legislative activity.

To what extent, you know, and this I think is one of the questions that goes back to not really knowing what's in the documents, to the extent that they are seeking documents relating to your correspondence with the A.G.'s Office, any correspondence the AJC may have had with other entities, would those communications be legislatively protected activity or is there some other basis of which you're arguing they should not be disclosed?

MR. ANDRES: So, let me take that. I'm not familiar with that case, Your Honor, but in terms of -- if the question

relates to information that the Judiciary Committee shared with law enforcement about the sexual harassment issues or any of the issues, obviously, sexual harassment was one of but four different areas that we explored in terms of the impeachment investigation.

But to the extent that they were sharing with law enforcement, again, that was pursuant to the direct mandate of the Speaker of the Assembly, who you know, ordered the Committee or mandated that the Committee that it share and cooperate with law enforcement.

So from a -- from that standpoint, again, I think it would be a legislative function to be sharing that information with law enforcement and coordinating with respect to that work.

THE COURT: Okay, thank you.

Ms. Trzaskoma, you have a lot to respond to and I promise you we'll get to the A.G.'s Office.

MS. TRZASKOMA: Yeah, I appreciate the opportunity to address these arguments.

THE COURT: They are different.

MS. TRZASKOMA: I mean --

THE COURT: The privileges being asserted are somewhat different.

MS. TRZASKOMA: They are somewhat different, although they overlap. So just looking at Your Honor's question about

what you're supposed to look at to tell you whether what was going on here was some -- was part of legislative function or not, Mr. Andres said look at the mandate from the Speaker. Well, I'm looking at the mandate from the Speaker dated August 13th, 2021, which is Exhibit 9, to I believe my declaration.

And the Speaker says the Assembly will suspend its impeachment investigation. There are two reasons for this.

And then, the Speaker goes on to explain why the impeachment investigation has ended as of August 13th.

He -- the Speaker directed the Chair to turn over the relevant investigatory materials to -- and all of the evidence that the Committee gathered, to turn that over. There's no effort to keep it, you know, in the legislature and to keep it confidential. Instead, there's a mandate to turn it over and not keep it confidential.

And then, there's a second mandate, which is on August 16th. I don't know about the inner workings, what led to this, but the Assembly Judiciary Committee is now going to continue to review evidence and issue a final report on its investigation of Governor Cuomo.

No mention of any, you know, impeachment activities. It -- the purpose is very clearly now to continue an investigation for the purposes of issuing a public report.

THE COURT: But don't the Empecco (phonetic) and Chang cases that rely expressly on Doe v. McMillan acknowledge

that the preparation and publication of a report are legislative activity and that doesn't waive any legislative privilege?

MS. TRZASKOMA: It depends what the purpose of the investigation is. I mean, that's the Favors case, which --

THE COURT: Does it? Because the source of the authority is legislative authority. There's no other basis for them to issue a subpoena.

MS. TRZASKOMA: It's legislative authority, but if the purpose of that legislative action is not -- is that -- exercise of legislative authority is not for the purpose of legislating, but is for the purpose of, you know, as Your Honor said influencing the executive, influencing the public, communicating to the public, I mean, that was what this report was was --

THE COURT: But how would I ever that make that finding? And that goes back to my question of what information I could rely upon. Do I have to get Hasty and Debecks (phonetic) and ask them questions?

And then ask all the other members of the Judiciary Committee? Because that would be an intrusion. That would be totally inappropriate.

MS. TRZASKOMA: Well, Your Honor, they bear the burden. The Judiciary bears the burden. It's a high burden to show that the legislative privilege attaches. And under these

circumstances, they should have. I mean, there could be --

THE COURT: But you haven't answered the question about Empecco and Chang. And which again, rely on the Doe v. McMillan case, where this D.C. circuit, which has the most occasion I would posit to pass upon questions of, you know, attempts to get at materials that are being generated by committees, both of -- all of those cases hold unequivocally the preparation and publication of a report is part of a core legislative function and is within the sphere of legislative activity.

There -- nobody says it has to result in legislation. Do you have cases that specifically state that it has to result in legislation?

MS. TRZASKOMA: It does have to be part of the legislate -- like there has to -- I mean, the purpose of the legislative immunity, and I want to be clear that what -- that the legislative immunity is to protect the inner discussions and contemplations of the legislators, who are making decisions.

And if this had been -- had continued through an impeachment investigation, I think we would be very differently situated.

But what happened here is up until the Governor's resignation, there's an impeachment. There is consideration of impeachment. That is one of the purposes of the investigation.

But once it's no longer an impeachment investigation and the legislature changes its approach and its purpose, I mean, I think purpose is central to this question of why in those cases the D.C. Circuit held that that's core legislative material. It's because those reports were prepared in connection with legislative decision-making.

THE COURT: That was the Chang -- in the Chang case, the report concerning the metropolitan police. How was that -- how does that fit with your argument?

MS. TRZASKOMA: I have to look back at the Chang case.

MS. GLAVIN: Your Honor, if I might have a moment?

THE COURT: Sure. Citing the Empecco case, the Chang case stated we today decline to command the disclosure of information to test the accuracy of a printed statement, something that Cuomo has expressed interest doing here.

As the preparation of the statement for publication, the subcommittee report was part of the legislative process. That is the end of the matter.

And in the Chang case, they were investigating conduct of the police officers. There's no discussion of whether or not it resulted in any type of legislation or any type of action that you would argue is the type of legislative action that would be sufficient to have their privilege continue.

MS. TRZASKOMA: Well, in that case, Your Honor, they were considering legislation. I mean, there's a legislative investigation. And there were, you know, it did result in legislation about that very issue. So I think that is a distinguishing fact.

And to the extent in this case the Assembly can point to some legislation that grew out of its report, I don't -- it's not related to the issues that we're seeking discovery in.

THE COURT: But why --

MR. ANDRES: I mean, Judge, we cited to specific legislation that was passed.

THE COURT: No, I'm --

MR. ANDRES: And specific.

THE COURT: -- aware of that.

MR. ANDRES: Thank you.

THE COURT: What about Brown -- okay, here's another one that I found fascinating. This -- I don't know if anybody read this case, Brown and Williamson Tobacco Corp. v. Williams? Anybody?

In that case, a law firm paralegal basically stole a bunch of confidential documents from a tobacco company and gave them to a senator.

That senator then went on press, you know, "Meet the Press". It wasn't "Meet the Press". That type of show, talked

about them, they're on the radio talking about them.

And the D.C. Circuit said, no, absolutely not. You don't get to get these documents out of the senator. You don't get to intrude on the legislative privilege at all.

The fact that he has the documents is -- it's all legislative. Their own documents trying to get them back and the D.C. Circuit said no.

MS. TRZASKOMA: Well, I do think that that goes -- I mean, I would have to go back and look at Brown. That didn't make it to the top of my printed out cases, which I tried honestly not to have as many.

Yeah, I don't -- I don't even know if we had cited that case, but in any event, I will take a look at it, but I think that all of the cases, and we're happy to do supplemental briefing on the legislative privilege issue, all of those cases where the court finds legislative privilege is looking at what is it going on in that senator's thinking? What is that -- your -- the --

THE COURT: No, the point is not to go into what the senator's thinking.

MS. TRZASKOMA: No, exactly, it's to protect, it's to protect that process. Asking for the materials underlying the public report is not asking for what was going on in any legislator's mind.

THE COURT: But that's not what you asked for. You

asked for everything. As you conceded at the outset of the argument.

And so, everything. Evidence is evolution of the thought process of the various people involved in the investigation.

You could evidence how investigators were linking pieces of information to one another as the investigation unfolded.

You did not just ask for interview reports for the following 11 people. That is that not what your subpoena says.

And that goes back to the original questions of relevance and proportionality, but also, I think goes very far into the questions that are relevant to deliberative process and the legislative privilege.

MS. TRZASKOMA: I don't think, Your Honor, that we asked for -- I mean, we did not intend to ask for any documents concerning what legislators were doing or commenting or we did not seek those communications so.

THE COURT: Even just following the trail of what order the subpoenas were issued in can evince deliberative process and legislative intent. And there is ample case law that discusses that in the legislative immunity context.

MS. TRZASKOMA: Well, I don't agree that the outside investigators have. And you know, I don't think that that is -- evidences the -- any kind of legislative thought, but I

understand Your Honor's disagrees with that.

THE COURT: It did in Chang. I mean, Chang was a professor tasked to do this investigation on behalf of the special subcommittee.

MS. TRZASKOMA: Well, but again, the -- I think that there's a difference between the investigation that was conducted in Chan (sic), which was to inform future legislation and what we have here.

And I understand again that they have cited to legislation that they believe came out of this, but I don't think that was -- the purpose of this investigation was started out as impeachment.

Didn't start out as what is going on with the police department and what kind of legislative action can we take to deal with it.

That's not what the sexual harassment investigation into Governor Cuomo was doing. It was simply -- it started off as an impeachment, potential impeachment, and then, stopped once the Governor resigned. And then its sole purpose was to issue a public report. That's what it was.

THE COURT: But isn't that part of the legislative function to conduct oversight investigations and inform the public? How is that not legislative activity?

MS. TRZASKOMA: Well, it's not legislative in the sense of needing, you know, again, going back to the purpose of

the legislative privilege, which --

THE COURT: But (indiscernible) the Judiciary to define what the legislative -- what the speech and debate clause like encompasses.

We are -- the Judiciary's certainly not in a position to tell the legislature, you know, this -- what you did on the floor in this instance doesn't count.

MS. TRZASKOMA: But there are cases that say that like Favors.

THE COURT: Not on the floor. There cases that say that where -- if you can find the case law on the floor, I'd be fascinated to read it, but the cases that I have seen public speeches, constituent services, things wholly outside the chamber.

But do you have a single case where it is something happening within a committee or on the floor where they said that's not legitimate legislative sphere activity?

MS. TRZASKOMA: I think in Favors that was -- it was a publically released report in Favors. I mean, that was the case that went against Governor, you know, Governor Cuomo's position and the Attorney General's position at that time.

But it was a report, the New York State Legislative Task Force. So it -- it is the case that the Assembly Judiciary Committee bears the burden to show why the legislative privilege attaches here.

And I think that what we've heard is listen or read the Speaker's mandate. That tells you why this was legislative in nature.

And I don't think it -- they can use that because of the subsequent statements that transform -- that acknowledged that it was no longer serving that legislative privilege -- function. So I don't think they've met their burden.

THE COURT: So is it your argument that the entire investigation was like somehow *ultra vires*? Like they were acting outside the scope of the -- as to the legislators?

MS. TRZASKOMA: No, that's not --

THE COURT: Because I mean, that's what the sort of extension of your arguments.

MS. TRZASKOMA: Well, I would urge Your Honor to look at Favors, which involved a legislative report. And you know, for a lot of reasons, the court ordered that information to be turned over, including under Rodriguez, which leads to me to the Rodriguez factors. You know, I think even where there is a privilege, it's not -- it can be overcome.

I -- Governor Cuomo takes issue with the idea that this is not an important case, a significant case. It certainly is to him.

He is not the only Defendant. And it's not correct that the State is not involved in this case. The New York

State Police are a Defendant. The Plaintiff, Trooper 1, has indicated that she intends to bring a claim against the State. So this is very serious.

And you know, I think the Rodriguez factors weigh in favor of requiring the disclosure of at a minimum the interview memos and the documents that the Assembly Judiciary collected on top of whatever they got from the Attorney General's Office.

And I just want to touch a little bit on, first, the sovereign immunity argument. Dugan [DOO/GAN], or Duggan [DUG/AN], I'm not sure how you say it, is -- references a judgment. That is how courts have looked at that case and limited the scope of sovereign immunity.

There is no principal line. The cases do not distinguish between state agencies and core government bodies. The cases say -- they do distinguish as Your Honor as noted between, you know, municipalities and local governments.

But in terms of the state for purposes of 11th Amendment, that's a very broad swath of agencies and other government bodies that would be able to claim.

And there really is no -- there's no line. There -- it is an absolute immunity. Russell v. Jones makes clear that it's like either you're immune or you're not. There's no exceptions. There are no it applies to this body, but not that body.

It is -- if Your Honor adopts sovereign immunity,

that is a, you know, huge change in the law in this circuit. And it would allow state agency --

THE COURT: I certainly don't think I'd be the last word on that if I were to do that.

MS. TRZASKOMA: Well, Your Honor, would be caught -- setting in motion the huge shift in the law. General Electric, which is a case that applies to federal agencies and it's not a state sovereign immunity case, is completely different. And in part, that's because federal agencies are immune, but they can be subpoenaed pursuant to the APA. So there's a whole regulatory and statutory scheme for federal agencies to be compelled to produce documents.

But what the Assembly Judiciary Committee and the Attorney General are proposing is that they have the last word on whether they have to turn anything over pursuant to a subpoena.

There's no oversight, no judicial oversight, no regulatory scheme. There are no standards to guide any agency's discretion as to whether to comply with the subpoena or to turn over documents or not. They can just willy nilly say yes in this case, no, in that case.

They could -- I mean, the opportunities for mischief are really endless. And particularly in unpopular cases where, you know, the administration or the state agencies might not like a particular litigant, might not want to comply with that

particular litigant's Rule 45 subpoena. And you know, so that's the scenario that they're setting up.

With respect to attorney-client privilege, again, it's their -- it's the Judiciary Committee's burden to establish that any of the documents are subject to the attorney-client privilege.

Their -- not everything lawyers do is privileged. Not everything lawyers do is work-product. The attorney-client privilege does not protect the Judiciary Committee's discussions with witnesses. It does not protect the Judiciary Committee's discussions with lawyers for witnesses.

And if the materials are prepared in anticipation of a public report, that's not work-product. So -- and we don't have a privilege log.

So what we have is the Judiciary Committee providing us with the same kind of log that the Attorney General did, which is just very high level information, you know, information about what categories of documents they're withholding.

But within those categories, I can think of, you know, most of them. I can think of lots of documents that would not be subject to an attorney-client privilege, even assuming that Davis Polk was retained as outside counsel to provide legal advice.

I mean, that's the -- that's when the attorney-client

privilege attaches. Is there a confidential communication for the purpose of providing legal advice as opposed to conducting an investigation, issuing a public report?

It may be that Davis Polk provided advice to the Judiciary Committee about impeachment law, standards, sexual harassment law, I don't know.

But it's not obvious to me what the legal advice -- and I didn't see it anywhere in their papers, what legal advice Davis Polk was being asked to render and, sorry, how that -- if there was legal advice being given, how that claim covers every single document in our request.

And I would just say -- I would say the same thing with respect to the work-product privilege. It -- to the extent it ever existed, and you know, maybe impeachment is a litigation, maybe some of this material is prepared in anticipation of that.

But at some point, again, that shifted. The purpose of this material is now to be used for purposes of creating a public report. That is not the primary purpose of -- it no longer was the primary purpose of creating these materials.

THE COURT: Okay.

MR. ANDRES: Judge, just three things and then I'll --

THE COURT: Yeah.

MR. ANDRES: -- then I'll yield to the A.G., but we

beg you to read Favors.

THE COURT: Ms. --

MR. ANDRES: We beg you to read Favors because there --

THE COURT: I've read Favors, but continue.

MR. ANDRES: The fact of a public report did not waive the legislative privilege. And the one document that was ultimately ruled not within the legislative privilege was ruled to be the equivalent of a press release. It's nothing like the work -- and we did that.

I can assure you that Davis Polk, when it was hired by the Assembly, we're not doctors, we're lawyers. And we provided legal advice to the Assembly.

Lastly, the only way to make new law here, the only way to make new law here is to rule in favor of Mr. Cuomo and violate the General Electric standard, which governs. And with that, thank you.

MS. GLAVIN: Can we take a short bathroom break?

THE COURT: Yes, we may, Ms. Glavin. Can we come back in five? Is that good for everybody?

MS. TRZASKOMA: Yes.

THE COURT: Thank you.

MR. AMER: I will be back for sure.

THE COURT: Yes, please come back.

(Recess taken at is 12:32 p.m., recommencing at 12:39

p.m.)

THE COURT: We have everybody back? Yeah, great. Okay, are we back on the record?

THE CLERK: Yes.

THE COURT: Oh, okay, we're back on the record apparently, thank you. Thank you all for coming back promptly. So we obviously discussed at length, you know, sort of what may or may not exist on the Office of the Attorney General's website.

And you know, my questions to Ms. Trzaskoma at the outset with regard to kind of the universe of documents that could be sort of more tailored or potentially relevant to the case.

But I wanted to actually start with the Office of the Attorney General by asking, you know, if there's anything other than these four documents, I mean, you guys have met and conferred and discussed it.

Is there any sort of group of documents that you are actually willing to produce, what has been produced, just kind of curious about the state of play?

MR. AMER: Sure, so first of all, the -- what we're talking about is four documents. Those are documents that through a search that we ran actually referred to Trooper 1 by name. And it actually comprises about 100 to 200 pages of material. So it's not a small amount.

We start from the premise, Your Honor, that you know, the report is not on trial here. And it shouldn't be on trial here.

I wrote down and I believe I got this quote right. Ms. Glavin said at one point that interview memos are relevant to whether the report is reliable.

And I think that kind of sheds exactly the light on this attempt to subpoena the investigative material in a proper context.

This is all about the Movant's attempt to attack the report and to gather evidence to show whether or not the report's reliable.

But the report has nothing to do with the Trooper 1 case. It's not about the report. The Trooper 1 amended complaint refers to the OAG investigative report in one paragraph, paragraph 4 of the amended complaint. And nowhere else is there any reference to the report.

Now it's true that Trooper 1, who has the same access to the material on the OAG website as everybody else, quotes liberally throughout her complaint to other complainants' testimony that's been published.

But that's got nothing to do with the report or the investigation. And there's no reason why the Movant needs to test or challenge the reliability of the report.

The investigation itself, we should all remember,

took place months and in some cases years after the conduct that's at issue in the Trooper 1 amended complaint, the conduct that she alleges with respect to the sexual harassment by the -- allegedly by the Movant.

The other thing I would mention is that the Movant here knows the name of all of the other 10 complainants. We know that because during the Movant's interview under oath by the investigators, he was questioned about each of the other complainants and the names were disclosed.

And Ms. Glavin was representing the formal governor at that examination. And if I'm certain of anything, I'm certain that she wrote down the names dutifully on her legal pad when they were disclosed during that questioning.

So the basic issue we have here is that we don't see how anything related to the other 10 complainants can possibly be relevant.

There's no allegation in the Trooper 1 complaint that is akin to a workplace environment-type discrimination claim. I would also point out that Trooper 12 is alone among all 11 complainants in being a trooper, a state trooper.

All of the other complainants, none of them are employees of the New York State Police. They're either current or former employees or former employees rather of the executive chamber or other state agencies, but Trooper 1 is unique in that she is the only state trooper.

And her allegations in the complaint are not about some sort of hostile work environment, where other complainants might be relevant under some of the cases we cited. So --

THE COURT: You know, just pause on that for a moment. I mean, I think it's a little premature as I mentioned -- you know, for me to be weighing in on whether or not information regarding some of these other complainants may or may not come on at trial. We don't know yet what the 404(b) practice will look like. We don't know how people will testify, whether doors will get opened. You know, it's all a bunch of question marks, right, with regard to how the evidence could shake out at trial?

MR. AMER: And the Movant as a Defendant in the Trooper 1 case has available all the means of discovery that any litigant has.

If he wants to depose the other complainants, he knows who they are. He can depose them. If he wants to request documents from them, he can do so.

But to try and use our investigation as the conduit through which this material should be discoverable is just inappropriate.

It's inappropriate because it raises all the privileges that we'll discuss at more length in a minute. But it's also because it's being used as a pretense, Your Honor, to achieve a purpose that the Movant has, which we've demonstrated

in the declarations we've submitted to attack the investigation and to impugn the integrity of both the lawyers who worked on the investigation team, as well as the Attorney General's Office. And that's not an appropriate purpose for which to subpoena a state agency. It's just not.

Again, they know who the complainants are. And they have all of the same public information that is cited in the report that Trooper 1 has.

And the Movant should be required to use the discovery tools at his disposal as a litigant to the same extent that any litigant can to seek discovery that's relevant. But it, you know, it just makes no sense to allow investigative materials to be subpoenaed for that purpose.

THE COURT: Well, in weighing, you know, sort of the undue burden piece of the analysis that I would need to evaluate both with regard to evaluation of relevance and the motion to quash standard, what do you make of the current situation where the A.G.'s Office has to fund the defense?

I mean, your argument is it's going to be less burdensome. It's more appropriate for him to just go conduct civil discovery like any normal litigant, right? He's not exactly a normal litigant at this point in light of the ruling that the A.G.'s Office does need to fund the defense.

Is there some argument for expediency or efficiency, as Ms. Trzaskoma started with, that would suggest or counsel

that this would be more efficient in terms of getting the information that he seeks with regard to those other 10 complainants if limited to for example the interview memos?

MR. AMER: So let me say first of all that I disagree that the Governor's not like other litigants just because there's been a POL-17 determination that as a state employee he's entitled to have his defense funded by the taxpayers.

I think, you know, in many, if not most instances where state employees are sued, they seek a POL-17 determination, and are given a determination that they're entitled to state-funded defense, provided that their conduct falls within the scope of their employment.

And that was the key issue that was being litigated in state court. And the state court judge held it was at least arguably within the scope of his employment.

But I don't -- so I don't think that makes him unique in any respect. And I think that the POL-17 determination that he's entitled to a state-funded defense actually cuts against the Movant's position because it's our view that the Movant is using the subpoena here to obtain material that has nothing to do with his defense in the Trooper 1 action, but rather is for his own personal use in attacking the investigation.

So it adds insult to injury in our view to have taxpayers fund his counsel's review of material that actually has absolutely nothing to do with defending the Trooper 1

action.

So, I think, if anything, the POL-17 determination suggests that this Court should make sure that anything that the taxpayers are going to have to fund by way of attorney time, reviewing material, is definitely relevant to his claims and defenses in that case.

THE COURT: Ms. Trzaskoma has argued and so has Ms. Glavin, you know, that some of the interviews may have been of witnesses, other troopers who may have been around, people who may have seen or heard some of the events or the aftermath of any events. How are they to identify those folks?

MR. AMER: Well, the same way that any Defendant identifies potential witnesses. I mean, they actually have the added benefit of the report, but presumably they can seek discovery.

There is, I would add, that a Defendant in the case is the State Police. But they don't need our office's investigative work to shed light on where they should pursue discovery in the case.

And they have the name of every complainant. We will, as we indicated, provide to them the 100 to 200 pages of material where Trooper 1's name is identified.

But again, this is not a case that involves a hostile work environment. So it's unclear to me what the issue would be that would be broader than just Trooper 1's account of what

happened to her, the Movant's account of what he did, and whatever records exist within the executive chamber concerning, you know, her assignments to protect him, but all of that is available to the former governor.

And like I say, I think in fact the report, you know, points him in all of the directions he needs to go to defend this case.

And anything that relates to this desire to attack the investigators is in our view completely off-base and not appropriate.

I did want to talk about sovereign immunity, Your Honor. It is a threshold issue. And in our view, it's the clearest path for the Court to resolve these motions.

We do think that the Court's hands are tied by the 2nd Circuit's decisions in the G.E. case and the Glotzer case.

In those decisions, the 2nd Circuit said in no uncertain terms that a subpoena served on a government agency is a judicial proceeding that triggers sovereign immunity. And it did so by invoking the standard under Dugan.

And there's just no principal basis to draw any distinction between that ruling, depending on whether the government agency is a state agency or a federal agency or quite frankly as Judge McMann determined in the Catskill Development case, is a tribal party, entitled to tribal immunity.

She in that case extended the 2nd Circuit's rationale in G.E. and Glotzer to a subpoena served on a tribe and determined that that triggered -- that was a judicial proceeding that triggered tribal sovereign immunity.

And it -- it's true, well, a couple of things to observe. One is that in all of these cases, the court went on to hold that although sovereign immunity was triggered, there was waiver. And so at the end of the day, sovereign immunity didn't bar the subpoenas, but that's a separate question.

And I think this Court is bound by Glotzer and G.E. to find as an initial matter that the subpoena served on a state official, here the A.G.'s Office, is a judicial proceeding that triggered sovereign immunity.

And it is true that other circuits have not applied Dugan in the same way and have determined that unless you have a judgment, it doesn't trigger sovereign immunity.

And then maybe that there's a circuit split that the Supreme Court will have to resolve, but we're in the 2nd Circuit. And the 2nd Circuit law is clear that the subpoena is a judicial proceeding that triggers sovereign immunity.

And I don't even think another panel of the 2nd Circuit could ignore that ruling. And unless and until the 2nd Circuit sits *en banc*, it is the law within this Circuit that a subpoena on a government agency is a judicial proceeding that triggers sovereign immunity.

So then you go to the next question, which is has there been waiver of sovereign immunity? And in General Electric and Glotzer, there was waiver due to the APA. That statute obviously doesn't apply here.

There has been some limited abrogation of New York's sovereign immunity through the Freedom of Information Law.

So there is a procedure under FOIL for any member of the public to seek agency documents. And I disagree with the notion that the A.G. has the final say because as I'm sure the Court's aware, a FOIL determination is subject to challenge in state court under an Article 78 proceeding.

That's the procedure that a party needs to follow if they want to get documents from a nonparty state agency under Glotzer and G.E.

And if you can name a state officer as a party, then of -- in an ex parte Young case, then of course, you can seek discovery through the normal federal rules or CPLR if your federal rules if you're in federal court. I don't think that ex parte Young applies to this situation.

THE COURT: Well, what if the subpoena were issued to Ms. James herself?

MR. AMER: I think Ms. James as a state officer absolutely has sovereign immunity. And I should point out that it's not --

THE COURT: From injunctive relief?

MR. AMER: Well, that goes to your point about whether she could be named as a Defendant in the case under ex parte Young.

THE COURT: But I mean, in a subpoena. If they sent a subpoena to her?

MR. AMER: Well, no, if you're talking about whether --

THE COURT: Or the records custodian --

MR. AMER: Yeah, yeah.

THE COURT: -- for the A.G.'s Office, whoever that may be.

MR. AMER: So the question is does sovereign immunity apply? And I think the answer is yes. And so, the subpoena would not be enforceable.

I think the ex parte Young fiction that allows federal courts to entertain a suit against a state official as a named Defendant doesn't apply here.

I mean, that legal fiction is that the state officer is engaging in some ongoing violation of federal law or is acting in some unconstitutional manner, and as a result, is not cloaked with the state office that enjoys the immunity.

THE COURT: Certainly, but the reason that I ask the -- for the analogy is because of the sort of type of relief sought, right, under the ex parte Young sort of injunctive relief, prospective relief.

MR. AMER: Well --

THE COURT: You're thinking about, you know, causing the state to act, which is different than dipping into the State's coffers.

MR. AMER: Well, but it's causing the -- so the ex parte Young doctrine doesn't depend on Dugan or what it is the State's being asked to do. It's based on the notion that the state official is engaging in an ongoing violation of federal law.

Nobody's contending here that the Attorney General's Office is violating some ongoing constitutional or federal law.

THE COURT: Certainly not implying that.

MR. AMER: No, no, so there's no basis to analogize this case or any subpoena situation.

If there is a circumstance where the Attorney General can be sued as a named party, and there are circumstances. And I've been involved in any number of them where the Attorney General has the statutory authority to enforce a law that is being challenged as unconstitutional.

And so, the relief being sought is to enjoin the Attorney General from enforcing the law that is being asserted as unconstitutional.

That's a classic ex parte Young situation. There's no sovereign immunity because of ex parte Young. And those cases go forward.

And in those cases, there's no problem with the plaintiff taking discovery of the state agency, whether it's the Attorney General or the Commissioner of DMV, or you know the Tax Commissioner, whoever it is the state official was being named as the Defendant in the case.

I mean, I will say that at least for some of the cases that are being cited by the Movant, where you do have a state official, who is named properly under ex parte Young.

So, for example, an 8th Amendment case brought by an inmate suing the facility superintendent, who is an employee of DOCS.

You know, do you need to subpoena DOCS to get records from Albany if you've got as a Defendant in the case the superintendent of the facility who's an employee of DOCS? I mean, that's a very different situation.

So the fact that an inmate can get records from Albany DOCS without subpoenaing DOCS or if you subpoena DOCS and DOCS is not going to raise its sovereign immunity argument that we're discussing here --

THE COURT: But what if they start? I mean, that's part of the sort of question, you know, I was posing to Mr. Andres in terms of the scope of where this could go.

MR. AMER: Sure, well, I think again, where you name a state official under ex parte Young, who is a state employee, I think it'd be a -- I don't see the circumstance, where

whatever records are relevant to that case wouldn't be produced, because you have as a parting defendant the state official who's properly named and subject to discovery. I think --

THE COURT: Okay, so how about this? You have a horrific murder on the highway. And the state -- you want to subpoena the state troopers and the State of New York for all of their road cameras and surveillance footage or whatever the state troopers may or may or not have related to this incident, but they are not a party.

MR. AMER: And --

THE COURT: Can the New York State Police just say no, no thank you --

MR. AMER: Well --

THE COURT: -- we have sovereign immunity?

MR. AMER: Those type of records are exactly the type of records that are FOIL'd. And in fact, we've all just recently seen some video excerpts of the former President Trump at his A.G. deposition. And those were obtained by a news organization submitting an FOIL request to our office.

And if the person who submits the FOIL request gets a determination that they don't want like, then they take that to the state court under an Article 78 proceeding.

So, in your example, video surveillance footage would be the subject of an FOIL request and that's exactly the

procedure that the legislature envisioned when it abrogated to the extent that the FOIL law New York's sovereign immunity.

And that's the path that is available. And I just don't see any principal basis to distinguish this case from Glotzer or General Electric with respect to the 2nd Circuit's initial determination in those cases that a subpoena is a judicial proceeding.

And it's for that very reason, I would submit, that the 5th Circuit in the Russell case held that the reasoning of those cases has to be extended to a subpoena against a state official.

You know, they looked -- the 5th Circuit looked at the cases that hold a federal subpoena on a federal agency triggered sovereign immunity and a subpoena on a tribe triggers tribal immunity. And it declined to follow those circuits that held a different standard under Dugan in the 2nd Circuit.

THE COURT: So let me ask you this. Is your argument more grounded on sort of common law principles of sovereign immunity or the 11th Amendment?

MR. AMER: I'm glad you asked that. And I want to make this clear. This is not based on 11th Amendment immunity. This is -- and it's not -- it's based on state's broad sovereign immunity that existed prior to ratification of the Constitution that the Supreme Court has certainly made clear exists independent of 11th Amendment immunity.

And you know, I don't see that as being any basis to distinguish the 2nd Circuit decisions, because a judicial subpoena -- a subpoena's either a judicial proceeding or it's not.

And if it's a judicial proceeding, then whatever sovereign immunity exists is triggered. So whether it's federal sovereign immunity, whether it's tribal sovereign immunity, or whether it's state sovereign immunity of the type we're talking about, which is the pre-ratification state sovereign immunity.

And there is an important distinction to be made between 11th Amendment immunity and state sovereign immunity that the Court most recently recognized in the Hyatt (phonetic) decision.

And that is that state sovereign immunity is jurisdictional under -- because it's governed by state law in terms of how you view it.

And New York views its own sovereign immunity as jurisdictional. So what that means that is you can't waive it by litigation conduct.

Now we would contend that even under the 2nd Circuit standard for whether you waive 11th Amendment immunity by litigation conduct, this record doesn't support a waiver finding but you don't even get there because under New York law, there's only waiver by abrogation.

And here, as I mentioned the only abrogation is the FOIL law and it doesn't allow this proceeding in federal court. It only allows a FOIL request followed by a challenge in state court under Article 78.

THE COURT: I do -- I think I know the answer because you made an allusion to it at the outset, but is it your position that the Court much reach this issue to decide this case?

MR. AMER: Yes, because it's jurisdictional. So we don't think the Court can entertain the --

THE COURT: You can't do the Springfield Hospital hypothetical jurisdiction thing?

MR. AMER: The Court has no jurisdiction to decide the motion to compel that this is a judicial proceeding that triggers sovereign immunity. It's a threshold question the Court needs to address.

And because the 2nd Circuit law is clear that subpoenas on a government agency trigger sovereign immunity, that really ends the question.

The only question actually that the Court would then have to address is whether there's been waiver. And for all the reasons I've mentioned certainly on this record, there's no possible basis to find that there's been a waiver of state sovereign immunity.

I did want to mention, I mean, we've talked about

relevance and the -- I did want to mention about proportionality.

We also think that in addition to Rule 26 requirement of demonstrating relevance to the claims and defenses in Trooper 1 as well as proportionality, that there's also Rule 45, which has a heightened burden on nonparties, which I think gets ignored in the other side's brief.

Most of the investigation that took place through the deputized law firms just has nothing to do with Trooper 1. There were 11 claimants. So only one was Trooper 1. And most of the investigation just by definition related to others who were not Trooper 1.

And as I mentioned, she was in a somewhat unique position as being the only state employee. And I would commend Your Honor to look at the Blue Angel Film's decision because there, I think it makes clear that if the purpose of seeking the discovery is to pursue an agenda that is unrelated to the defense of the claims at issue, that that's improper. And we would contend that that's what's going on here.

THE COURT: I could ask you the same question that I asked the -- Mr. Andres and Ms. Trzaskoma, what information or evidence would I even look to determine the true motivation and is that even appropriate at this stage without having a hearing?

MR. AMER: Well, I think there is information that

we've put forward in sworn testimony from Ms. Chun and Ms. Longley about what they saw during the investigation that suggested there was an effort to do oppositional research to sully the reputations of the investigators. That -- so that is in the record.

There's publicly available information that we have cited to, including the most recent ethics complaint that the Movant filed with the first department disciplinary committee where he, you know, attacks the investigation and the investigators.

So I think there's plenty of evidence that is in the record before the Court now for the Court to conclude that that is a motivating factor behind this subpoena.

I did want to briefly touch on the privileges. And I appreciate the Court's indulgence. I know we've been going for a long time, but I haven't been so I would --

THE COURT: You haven't been. Thank you. Go ahead.

MR. AMER: -- appreciate an opportunity.

THE COURT: Go ahead.

MR. AMER: So in terms of the attorney-client and work-product privileges, which sort of go hand-in-hand, you know, here the investigative team was clearly tasked with conducting an investigation with the purpose of providing legal advice.

It was to provide legal advice both on investigation

strategy, who to pursue in terms of witnesses, what documents to seek, and also, ultimately, whether there were violations of law.

And you know, it shouldn't go without notice by the Court that, you know, by specifically tasking Cleary and Vladeck, a firm that has specialization in employment discrimination, we were -- the office was certainly seeking that legal advice from people with that subject matter expertise.

Unlike the cases that the Movant relies on, where the purpose of the investigation was to render business advice, that was not what we have here. The purpose was for legal advice.

I just mentioned the Allied Irish Bank case that they rely heavily on. You know that was a situation where the rogue trader and the bank actually appointed as the lead investigator a banker, somebody who is not a lawyer.

And the purpose was to understand what went wrong and to be able to give business advice as to what procedures, internal procedures, would need to be changed to ensure that the rogue trading wouldn't happen in the future. So that's clearly a different situation than we have here.

This case is also distinguishable from other cases that they cite where the report that was ultimately published was put at issue affirmatively and then sought to be, you know,

cloaked with the privilege.

We think this is case is most like the General Motors decision, where the court agreed that investigative material retained their privilege, both under attorney-client and work-product privilege.

And finally, we think that clearly, we meet the requirement of material prepared in anticipation of litigation. There was always the possibility of impeachment proceedings from Day 1. There was always the possibility and expectation that there would be litigation from the complainants as happened.

And there was also anticipation that there may be litigation by the Movant himself, which of course also happened in the form of the ethics complaint that I mentioned.

And that's all of the aspects of the anticipation of litigation are set forth in the Longley and Chun declaration as being part and parcel of the thinking process that went into the investigation.

Let me speak briefly about law enforcement privilege. The notion that the Office of the Attorney General was not conducting a law enforcement investigation just makes no sense. I mean, the Attorney General is the chief law enforcement official of New York State. And the Office of the Attorney General is a law enforcement agency.

And so, of course, this investigation was a law

enforcement investigation that's entitled to invoke that privilege.

And although was the expectation and the intent that the report itself would be published along with evidence referenced in the report for in the interests of transparency, it was never intended that the investigative materials in the form of attorney notes, interview memos, communications between the OAG and the two private law firms, communications with other law enforcement agencies, it was never any expectation that that material would be disclosed.

And in fact, the opposite is true as detailed in the declarations in order to obtain cooperation of the witnesses that were interviewed, you know, which goes well beyond interviews that were taken under oath, in order to obtain a full cooperation and to address their credible fears of retaliation, they were promised that their information would be maintained as confidential.

And it contains a host of personal information. And it would absolutely impair the Office's ability to do investigations in the future if this type of material would be subject to disclosure in the way that this material is now being sought.

Assurances were provided. Cooperation was obtained. And it was very much important to the truth seeking mission of the investigation. And that is also detailed in the two

declarations.

There are over 100 witnesses whose identities have never been publicly disclosed. And you know, there are any number of investigations that our office conducts.

And in fact, the Court may be aware that we now have something called the Office of Special Investigation, which is tasked under executive law 70B to investigate civilian at the hands of police officers.

So those investigations are now mandated by statute and don't even need the 63.8 referrals.

So for all those reasons, it's critical that this material remain confidential. And for similar reasons, the deliberative process privilege applies here. This is an agency that was undergoing an investigation into whether there were violations of law.

So the agency, the other side claims that there was no agency determination, but there was. There was a determination as to whether or not the law was violated.

And there was a deliberative process that went into that determination that involved strategic planning of the investigation and ultimately, you know, many drafts back and -- many week -- drafts of weekly reports, drafts in internal communications between the investigators and the OAG.

So for all those reasons, we think this is analogous to the Thompson v. Lindbrook Police Department case, where a

D.A.'s office was conducting an investigation for purposes of making recommendations to other officials on whether certain actions should be taken.

And here, the Attorney General's Office was conducting an investigation to determine whether laws were violated for purposes of making a report that would then everybody understood would go to the Assembly for consideration of whether further action, namely impeachment, needed to be undertaken as well. So, for all those reasons, Your Honor, we think those privileges all apply.

I will also just quickly mention the enormous burden because Your Honor pointed this out at the very top of the argument, that you had concerns about the tremendous breadth of material being sought here. And I think that concern is very well founded. It is a huge amount of material.

The Cleary and Vladeck firms spent thousands of attorney hours going through the material that was ultimately published on the OAG website to ensure that that material was redacted to protect the confidential information that we assured witnesses would not be published.

And that involved, although some of that time, probably about a third of that time, related to dealing with the media material that was disclosed, so the videotapes, the transcripts. But the rest of it dealt with maybe a thousand pages of material.

So the balance is 73,000 pages of material. So you could do the math. And it doesn't -- it's not an answer to say, well, only a small portion will need to be redacted because you don't know what portion to redact unless you --

THE COURT: Read every page?

MR. AMER: Yeah, you have to read everything. So that's -- so that doesn't really provide any solace at all. So we're talking about a --

THE COURT: And your and --

MR. AMER: -- an enormous amount of --

THE COURT: -- their argument is that the confidentiality or the protective order in this case would be sufficient. Why is that not so?

MR. AMER: Well, it's not so because the person who this material is supposed to be protected from is the Movant. I mean, the witnesses were expressing credible fears of retaliation by the Movant and his associates and others in the executive chamber.

So it has the very impact on future investigations to say that we're going to disclose this material to the subject of the investigation that the law enforcement privilege is intended to avoid.

In other words, these witnesses cooperated because they understood and were assured that their personal information was not going to be divulged not to the public, but

to the Movant. I mean, that was the fear that they had and that was the assurance that they provided. So that's why producing this material under a protective order is just not an answer.

And, of course, it doesn't answer the initial question of why this material is even properly the subject of a subpoena in the first place, which is of course the relevance question.

And you know, in light of the fact that we're making available, you know, 100 to 200 pages of material that mentioned Trooper 1 by name and the Movant has the list of all the other complainants and all of the other information in the report to pursue discovery, we think that's sufficient and that's appropriate, but nothing more.

THE COURT: So, just to be clear, you know, you've argued the law enforcement privilege, the attorney-client privilege, the deliberative process privilege, and argued that there has been no waiver, but each of these privileges is a qualified privilege, correct? There are situations where they might not protect everything. Do you agree with that?

MR. AMER: Qualified in the sense that that there's -- there is -- there are circumstances under which the privilege can be overcome.

THE COURT: That's what I mean by qualified.

MR. AMER: Yes.

THE COURT: Exactly. And with regard to the deliberative process privilege in particular, you know, it does not cover factual material, correct?

MR. AMER: It wouldn't cover factual material except that, you know, attorney notes commenting on factual material. I'm thinking about for example the interview notes.

I mean, that would certainly be covered by the deliberative process privilege, as well as communications going back and forth between the Office of the Attorney General and the law firms conducting the investigation. That would be protected.

Communications going back and forth between the Office of the Attorney General and other law enforcement agencies that we were cooperating with, who were conducting their own investigations, that would be covered.

And there is in the Longley declaration the detailed agreement that was entered into between our office and these other law enforcement agencies that, you know, spelled out the confidential treatment that this material was to be afforded.

THE COURT: Okay, what about transcripts?

MR. AMER: So --

THE COURT: To the extent they aren't already turned over?

MR. AMER: -- all -- my understanding is all of the witnesses whose interviews were transcribed have been turned

over.

THE COURT: Okay. I'm sure you have --

MS. GLAVIN: Albeit with redactions.

THE COURT: -- a lot of responses.

MS. GLAVIN: Yes.

MS. TRZASKOMA: I know, and I --

THE COURT: It is now 1:25. I don't know if other people have other places to be. I was not expecting to go quite this long. I knew we'd be a couple hours. I wasn't expecting three. I'll be candid.

But Ms. Trzaskoma, Ms. Glavin?

MS. TRZASKOMA: Yeah, I'll -- we'll try to be brief. And just to respond on a couple of factual points, I would like to know of the 4 documents that comprise 100 to 200 pages what are those?

I'm guessing by the length, you know, they could be just a list of all of the troopers who were assigned to the PSU or I don't -- or you know, her personnel file. I'm guessing that it's not, you know, they're not kind of core documents that we're looking for.

You know, Mr. Amer said that the report is not on trial. True. We are not here to try the Attorney General's report, but this is a situation where the conclusions reached in the report are on trial.

THE COURT: Not really. I mean, the conclusions are

rank hearsay.

MS. TRZASKOMA: Well, the conclusion that Governor Cuomo sexually harassed -- the question did Governor Cuomo sexually harass Trooper 1? Did Governor Cuomo sexually harass the other 10 complainants? That question, the question that the Attorney General's report purported to answer, those issues are on trial.

THE COURT: Sure.

MS. TRZASKOMA: So it's -- you know, we have a situation where the question is what does any of the -- our work have to do with what's going on here? The factual overlap is identical.

So it's, you know, and it's not a -- we did as I said, and I will tell you that I am not here to make Trooper 1's arguments, but you know, on the question of relevance, and her counsel are here.

They can confirm this if they like, but I can think of a lot of arguments that I expect we're going to hear from Trooper 1 about how the other claimants, how those allegations are relevant to Trooper 1's claims.

THE COURT: Well, why can't you depose them?

MS. TRZASKOMA: We can certainly take their deposition, but it would be enormously efficient, much more efficient for us to have not -- have all of the statements that they made, the records of all the statements that they made

before complete, you know, all the information that they gave to the Attorney General's Office, not just what ultimately ended up being transcribed. I mean, those are statements, prior statements, that those individuals made to the Attorney General, and you know, about their claims.

And so, you know, that is absolutely relevant. Just quickly on and, you know, also it is not true that Governor Cuomo was informed of every claimant, you know, every complainant.

State employee number 1, that -- the identity of that person was never disclosed and including not during the Governor's testimony.

And you know, ultimately, this is, you know, this is -- it's -- well, and you know, that is not even taking into account the statements by all of the witnesses that the Attorney General interviewed.

There are hundreds of witness, you know, more than 100 witnesses whose statements we just don't have, whose identities we don't know.

And in, you know, in a situation like this where that information exists in one place, it -- we should be able to get it.

THE COURT: I totally understand how it would be nice to get it, right? It's much more efficient, it's more convenient for the reasons you described.

But the end of the day, and I -- it might have been discussed at length in your argument today, but in evaluating the motion to quash standard, I need to look at whether or not there's an undue burden assuming that I have jurisdiction for now. I have to look at whether there's an undue burden being placed on the third-party. They're a third-party in this case. They are not even the Defendant.

And under those circumstances where it's taking 2,600 odd hours to redact 1,000 documents, how is it that your efficiency outweighs their burden and the burden on the taxpayers, not to mention the conscription of whoever will be tasked doing this work, which is something I should look at under the case law.

MS. TRZASKOMA: Well, I believe and the Attorney General's Office should correct me, but I believe based on publicly available information about the contract, the State's contract with Cleary Gottlieb, that it has been extended, additional funds have been set aside.

So there already -- there is already a law firm in place to do this work. And I don't think that if you compare that to, I mean, you know, Your Honor, we thought we could get discovery done relatively quickly.

Obviously, we ran into the six-month roadblock with getting what we think, you know, are the starting points for an efficient discovery process.

We're -- if we have to go out and re-create these two wheels, so there's the Attorney General wheel, which is enormous amount of work. They spent millions of taxpayer dollars doing it. And then, the Judiciary Committee added on top of that, spending even more taxpayer dollars.

And then, the expectation that Governor Cuomo and the other Defendants in this case several, the New York State troopers, another Defendant who is also certified for a private defense, are going to have to go out and re-create that wheel.

THE COURT: That's not what you have to do. You have to actually conduct discovery relevant and proportional to this case.

What the Attorney General's Office mandate was was to look at the whole thing, the whole shebang from soup to nuts, beginning to end figure out if there was misconduct in the office, right, relating to these specific issues.

But that's not that what this case is. This case is one Plaintiff over a span of years saying she had multiple interactions with this person.

You take her deposition. You depose some of the other witnesses, she may or may not have been there. That's what's relevant and proportional to this case.

MS. TRZASKOMA: Well, Your Honor, I've really I mean, I'm happy to have Mr., you know, have the Court say half of the complaint irrelevant. Trooper 1 can never introduce evidence

about complainant number 5 because that's --

THE COURT: And you can depose all of the complainants, can't you?

MS. TRZASKOMA: Well, but the problem is, Your Honor, that the way that I expect Trooper 1 is going to want to use the other complainants is to say if Governor Cuomo says it was an incidental touching of her --

THE COURT: (Indiscernible) M.O. I get it.

MS. TRZASKOMA: Yes.

THE COURT: All of the regular 404(b) arguments.

MS. TRZASKOMA: Right.

THE COURT: I don't mean to cut you short, but I understand.

MS. TRZASKOMA: So then the Trooper 1 is going to come forward and say yo ho, not an accident. Not incidental. It was intentional. He has a pattern of this. And look at these four other complainants who testified that he did something, you know, who testified that he did something similar.

So, for each of those, we have to figure out if they're reliable or not or credible or not. It means we have to do the exact same work that the Attorney General says that --

THE COURT: Well, you're going to want to depose them anyway.

MS. TRZASKOMA: It's not about depositions. It's about being prepared for the depositions and understanding. There's already a tremendous amount of work done that led the Attorney General to conclude that things, you know, that witness statement or that claim, you know, claims that people were making were or were not credible.

And for us to go through, we would be doing the exact same thing. Is this witness credible? Well, let's go talk to, you know, everyone else who she worked with. Let's go talk to people who she talked to. Let's get her emails and then go talk to the -- I mean, you follow the rabbit down the hole.

THE COURT: You're going to want to do all that any way.

MS. GLAVIN: Are you going to let us?

THE COURT: I mean, you're going to want to do it all anyway because --

MS. TRZASKOMA: Well, I'm really trying shorten and try --

THE COURT: At the end of the day, at the end of the day, reading a cold record does not tell you much about what the witnesses are going to be like in person, how they're going to present on the stand, all of those factors that go into an evaluation of the case.

MS. TRZASKOMA: 100 percent, but it is much easier as you know to cross-examine a witness with their 3500 material.

For example, what did they say previously? What did they say the first time they came in and met with the New York Attorney General? What did they say the second time they came in and met with the New York Attorney General? How did their statements change from beginning to their testimony? And what was not in their testimony?

It's -- I get that it -- we're going to want to do some of this again, but I am telling you it will be so much more difficult and burdensome and complicated if we have to for every single claimant do what we're doing. The -- we have to defend every single claim.

THE COURT: I totally get it, but the question is under the law, why doesn't that burden fall on you as the Defendant as opposed to the third-party, who would have to spend hours or however many hundreds of thousands of dollars paying Cleary to do the review and the redactions?

MS. TRZASKOMA: Well, I think we have a problem with their burden argument, which is they have just said 73,000 documents all need to be redacted. I actually don't know that. I don't know if, for example, you know, 20,000 of those documents were documents that they got from the executive chamber. I don't know --

THE COURT: Ms. Chung's declaration is, you know, quite specific in terms of all of the steps that were taken and all the things that they've done, but continue. It's okay.

MS. TRZASKOMA: No, her -- it's specific about what they did -- somewhat specific about what they did, but not at all specific about what those 73,000 documents are. So she just asserts we'd have to go -- there are all these documents.

THE COURT: Well, because they say they're privileged.

MS. TRZASKOMA: Well, I want to get to that. I definitely want to get to that.

But you know, it -- it's our view, we're happy to and would have done this in a meet and confer if there had been a back and forth like there usually is. We didn't have that opportunity here because, you know, the door was just slammed in our faces from the get-go.

And I get that the Attorney General doesn't want anyone questioning the report or the report's conclusions, but that's kind of star chamber stuff, right, where they have unidentified witnesses, like secret witnesses, secret claimants.

We're -- that doesn't make any sense here where public allegations, including in Trooper 1's claims, are public complaint.

THE COURT: Well, and that's why the report's not admissible, right? I mean, like you -- you're right. The process by which the report was generated did not provide your client what you would argue is full opportunity to be heard,

cross-examine all the witnesses, have the due process that would be consistent with the Court. But that's why the report doesn't come in. And that's why the report's not on trial.

So, if you know, you guys need to conduct robust discovery as to these other complainants. I understand that based on current allegations, there may be some relevance arguments that could be posited, but nothing is answering my question about why their arguments about undue burden -- why your, you know, efficiency argument outweighs their burden?

MS. TRZASKOMA: Well, I would like to know, I mean, I think that the question is what would the burden be to produce to us the interview memos? What would that burden be?

Because I think, you know, it's not enough for the Attorney General to say they want so much, it's also burdensome. I think for each request, they have to say why, you know, why is the information being sought in this request particularly burdensome and what would it take?

And that's my problem with the just throwing out 73,000 pages is or 73,000 documents is that it doesn't really help us figure out if the Court is going to narrow the subpoena, which would be fine with us, what makes -- you know, given their arguments and burden, what would make sense in that regard? Just --

MS. GLAVIN: I want to hit on the interview memos, because I think, as I mentioned to the Court, we're happy to

provide to the Court if it would be helpful for you -- Your Honor in judging the burden argument.

Take a look at some of these interview memos. I know as an AUSA, I routinely did these on my own doing redactions and could do it in a day.

I am not questioning the burden it took for the A.G.'s Office when they wanted to release these to the world. I'm sure it took a ton of time to edit the video statements. We're, you know, past that.

Now, we're just talking about there are witnesses to this case. And it's not just the complainants but there are witnesses to these events, some of which, you know, I'm sure Trooper 1 might be interested in. They said they corroborated it, but it's also important to the Governor's defense that there are witnesses that have exculpatory information.

And you can see that in the report, witnesses that do not remember anything of note in a particular instance say with Trooper 1, or say with Lindsey Boylan, or say with Britany Commisso.

I agree with you, the report shouldn't come into evidence. The judge hasn't ruled on that.

What we have heard from Plaintiff is that they have a theory that the report could come in under an admission by party opponent theory if the State is a Defendant in the case.

I agree with you. I have the same --

THE COURT: Skeptical of that.

MS. GLAVIN: I gave the same look to the (indiscernible) firm when they raised that. I said there's no way that comes into evidence. And we want to make the arguments of course it can't come in because it's full of hearsay.

So I don't think it's going to come in. It's not to say we're not going to argue about it.

But let's put the report to the -- put the report to the side. With those interview memos, again, I can give them up to the Court, I just am finding it very difficult to believe it's burdensome having gone through this exercise as an AUSA and redacting, you know, memos that we've had to produce.

Getting them from law firms as an AUSA when, you know, a law firm has done an investigation and they're making, you know, presentations to the government and they want to hand over you know, memos.

The meat of these memos, the paragraphs between the intro and the end are Ms. Commisso said X, Y, and Z. Ms. Commisso doesn't remember this, that.

There are not interspersed within those memos attorney, you know, perceptions, et cetera. These are prior statements by witnesses, some of which we believe would be incredible helpful to our defense and that we don't have another party to subpoena that from.

So when you're saying you could do robust discovery, the report talks about other troopers they spoke to, not necessarily ones that Trooper 1 would know about or knows what they would have to say or what they remember.

So I'm just not -- I'm not buying the burden argument on those interview memos. And I think if Your Honor takes a look at them, I think you would very quickly be able to say, no, this is what we see routinely in criminal cases.

And I'll say in the interview memos, so the Governor was charged in that misdemeanor case. I think it was like October 28 or 29th.

THE COURT: Uh-huh.

MS. GLAVIN: We spoke to the D.A.'s Office because they had to produce discovery. We got some interview memos relevant to the, you know, to the groping allegation.

They were produced to us relatively quickly once they started getting them. They did initial tranche of discovery they had to go to the A.G.'s Office in getting them.

That material, we're not going to be able to get from all 11 complainants. So say we take all 11 complainants' depositions.

Well, I say probably 10 because there's one complainant whose name we don't know. State employee number 1 was never disclosed to the Governor during his testimony. And we don't have that person's identity to this day.

State entity employee number 2, we became aware of just because you could deduce it through, you know, public reporting.

But there's a whole host of people. Like there's also a -- there was a line that I focused on the A.G.'s report that there are a number of, you know, people that work for the Governor because part of, you know, the allegations that the Governor engaged in gender based, you know, discrimination.

They interviewed a lot of staffers. And not every one of those people was promised everything you'd say is confidential. They couldn't promise that. The A.G. knows they couldn't promise that because she went out and released all these transcripts.

And when she released the transcripts, she didn't have a back and forth. And I'm making that representation to the Court, you can ask the Attorney General's office, she didn't give a heads up to Trooper 1 and say how are do you feel about your testimony being released to the world on November 10th? She wasn't asked that and given an opportunity to respond.

And they were also released at a time when the Albany County District Attorney's Office had a pending investigation and there was a pending criminal case.

And the woman involved in that, Britany Commisso, had not only her testimony, you know, shown to the world, but the

video of it.

And so, you know, this idea of people being promised confidentiality, they couldn't have made that promise because they couldn't have kept that promise.

They were going to have to do a report. And if it there were criminal investigations, their names were going to have to be provided to the Governor's attorneys.

On this issue that, you know, some people -- I have looked at the interview memos. I don't see notations of the interview memos of people saying promise me, you know, the witness does not want the Governor to ever know X, Y, and Z about this. There's a lot of interview memos that I think are exculpatory.

Witnesses who know some of the complainants that will say -- I mean, I see -- saw an interview memo saying you could not believe this complainant.

In particular, there -- you know, I had an interaction with her. She lied to me. I'm not going to be able by doing the deposition of this particular complainant going to get out of her sort of that incident unless I have that interview memo.

That complainant's not going to tell me about the interaction with Jane Doe, who worked with her on a daily basis to the Chamber.

So, for us, it's not just about, you know, testing as

well the truth of the allegations of Trooper 1's complaint. It's also about us getting exculpatory information from people who were there.

It goes to our ability to defend against the allegations because our client maintains, one, a number of these incidents did not happen in the way they're being alleged.

Two, a number of these incidents just didn't happen.

And three, for some of these incidents if, you know, I commented on someone's hair, yes, I -- it's not gender based. I commented some of the men's hair as well. All of that goes to our defenses and puts us in a position as well for summary judgment motions.

So what we're trying to do here is we know there is a place, okay, that these interview memos, some of which were already provided to us under discovery in the criminal case, we know there's a universe, a place, that we won't necessarily find out about I think a lot of which we won't find out about by just going out and subpoenaing tons of people and getting depositions.

Your Honor already dealt with when the case started, you probably remember one of these initial conferences, we were talking about how many depositions do you think you're going to take? And under the rules, I think it says 10.

THE COURT: Uh-huh.

MS. TRZASKOMA: We have 11 complainants. And you know, I know Mr. Ligar (phonetic) is here, Trooper 1's lawyer's here.

If we just start with the baseline 11 complainants, then I got to figure out who all the troopers were that might have -- that not might have, I know have relevant information but I don't know their names.

And then, get subpoenas to all of them and take their depositions when we know we have prior statements that are recorded. That would be 3500 or Jenks, you know, in any universe. And we understand will have information that is incredibly exculpatory.

I'm somewhat surprised that Trooper 1 did not join in our subpoena on this, but the interview memos I just think are core and I don't think it's going to take that much work.

With respect to the documents, 79,000 documents --

MS. TRZASKOMA: 73-.

MS. GLAVIN: 73-, sorry. 2,500 of those were a production by Governor Cuomo, okay, so I know that category.

There's also, you know, thousands of emails that were produced by the executive chamber. I think you could whittle that number down pretty quickly if you -- if Your Honor would entertain us or indulge us by saying why don't you sit down with the A.G.'s Office and talk about what different categories are in there.

The Blackberry pins, you know talk about that. Trooper Blackberry pins or the Chamber Blackberry pins, of course that would be information that's relevant in terms of when you talk about say Britany Commisso, Alyssa McGrath, or two an executive assistants that would staff the Governor, what they're talking about with the other assistants during the time period in question. And they are two of the complainants in this case.

All of it is right there. Ms. McGrath and Ms. Commisso necessarily may not still have access to their pins. So are we going to have to subpoena the executive chamber to go and get any relevant pin records from Ms. Commisso and Ms. McGrath during the time period?

Same with the emails. They may not have the ability to pull all of those, you know, relevant emails. We would have to go and ask the Chamber.

Lindsey Boylan, she claimed that she was sexually harassed while she was working for the Empire State Development Corporation.

Presumably, the Empire State Development Corporation would have pulled her emails during the time period in question, such that we can figure out when she was on this plane where she claims strip poker was mentioned, when she was in the Governor's office where she claimed that he kissed her and he absolutely denies this.

Those would be in her emails. Lindsey Boylan's not going to have those emails because she doesn't work for the Chamber any more.

So I think for a lot of these, I think on the interview memos, I just implore, you know, the Court to think long and hard about this, knowing that these are going to be core Jenks material. And I can give Your Honor a sampling so you can see what you're dealing with. Not Jenks, it's (indiscernible).

THE COURT: I understand. No.

MS. GLAVIN: And on the documents, what we would also ask is what, you know, contemporaneous communications that the A.G.'s Office obtained for these core allegations.

So, for instance, you have, you know, with Trooper number 1, of course we're going to want all the relevant pins and email correspondence that Trooper 1 isn't going to have.

I mean, we are -- as Your Honor knows, we're engaged in document discovery of Trooper 1. Trooper 1 apparently has represented to us doesn't have a -- I think maybe has one responsive text message from her phone. Doesn't have the phone anymore that she was using at the time period.

And you know, we're curious, not curious. I think there has to be relevant, you know, communications with the Chamber. You know, between the state police and the Chamber. Perhaps we can get that from the state police.

But also talking about we'll go through a couple of these others. State entity employee number 1, who you know, we still don't know what her name is, but what were the email communications that were subpoenaed amongst her group of people that she purportedly told that we don't know the names of those people, the email communications that are in the Attorney General's possession that deal with the four or five people that apparently were involved in the incident and communications? That's what we're looking for.

And if it would help the Court for us to even break this down more, we'd be happy to do that for each, to sort of go through and give you subsections and take each one of these complainants.

THE COURT: Should the Court conclude, and there's a lot to chew on in this case of course, that the sovereign immunity issue does not, you know, sort of end the inquiry as to what you can seek to obtain from the Attorney General's Office, you know, I certainly do think a more granular understanding of what, based on your case knowledge and the discovery that you got in the other misdemeanor case, showed with more precision what you think exists and how that's relevant.

And because part of the challenge candidly of the subpoenas is that, as I asked Ms. Trzaskoma at the outset, it appeared to me that the subpoena basically sought every

document reviewed, generated, obtained, or communicated during the course of the investigation.

And that is just too much. And it is not proportional to the needs of the case.

The burden that has been amply established by the declaration submitted by the Respondents illustrate that it would be a tremendous undertaking for any firm, even one the size of Cleary to try to, you know, go through those documents. It's not going to be a small project.

And you know, I'm not saying I'm going to order this now. There's a lot to chew on here and I have a lot of things to think about based on the briefs and today's argument.

But I certainly think that that would be helpful. And you may, you know, even be able to get some specific things that the A.G.'s Office may agree to.

If it really is the Blackberry pin messages and those are a reasonable production that can be disclosed. And they don't implicate work-product because they are literally just the contemporaneous conversations that happen to be preserved in this one place.

There are maybe specific categories of things they're willing to give you. I think the touchier topics are going to be interview notes, the interview memos, things that may contain impressions.

I understand they may be able to redact it, but we

don't have a sense of the volume you know, so I do think that trying to work through with more precision what you're looking for would certainly benefit everyone.

MS. GLAVIN: Okay.

THE COURT: Mr. Amer?

MR. AMER: Just I want to make a few quick points. First of all, the testimony that was made public by the Attorney General was obviously redacted. So it was consistent with assurances made about protecting confidential information.

The interview memos are classic work-product. And they're not entitled to them.

And yes, it's a qualified privilege, but I didn't hear anything that meets the requirement for overcoming that privilege. Ease and convenience just don't cut it in terms of overcoming work-product.

With respect to the pins, they have a Defendant in this case, the New York State Police. They should serve discovery on the New York State Police to get the pins. That's the course that they should take.

And you know, for all those reasons, I didn't hear anything that would overcome our privileges or address the relevance and burden and proportionality arguments.

THE COURT: Okay.

MR. AMER: Thank you, Your Honor.

THE COURT: Thank you.

MS. TRZASKOMA: Your Honor, just may I just very briefly --

THE COURT: Uh-huh.

MS. TRZASKOMA: -- on the privilege question? As to attorney-client privilege, I do not believe that there is an attorney-client relationship between the Attorney General's Office and the independent investigators.

All of the materials, the engagement agreements, the appointment letters make clear that the -- that the investigators are not -- are conducting an independent investigation. They are not acting as the Attorney General's counsel.

This was not a situation where there's an investigation into goings-on at the Attorney General's Office. Not a situation where outside counsel's retained to advise the Attorney General on past conduct in her office, future conduct in her office.

That is not -- I don't see how you can make claims of independence on the one hand and they're my lawyer on the other hand.

THE COURT: But that's not their only claim of privilege. They're also relying on work-product, no?

MS. TRZASKOMA: Well, then again, it gets -- I have a problem with the work-product doctrine as well because the purpose, the primary purpose -- the materials have to have been

created because of the potential for litigation.

And in this case, where the only reason the materials were created is to carry out the Attorney General's obligations under 63.8, that's not in anticipation of litigation.

The fact that their litigation may have, you know, is potentially on the horizon, the case law is very clear that that is not work-product.

So it is -- if the purpose of preparing those memos and conducting that investigation is not because of expected litigation, but is because of the directive under 63.8 to conduct an investigation, that's not prepared in anticipation of litigation. It's not.

So, yes, there were lawyers. They were doing lawyerly things, but they're not creating work-product. It's not to help the Attorney General in some future litigation. That's not what they were prepared for.

And I think the case law is very clear that that's not --

THE COURT: I think Mr. Amer is saying, oh, not just limited to litigation at the A.G.'s Office to be involved in, but the possibility of impeachment proceedings, the possibility of referral for criminal cases. In this -- the A.G.'s mandate is broad.

MS. TRZASKOMA: But the reason, if the memos were prepared because of 63.8 and they would have been prepared

anyway, in other words, if the prospect of litigation didn't affect the work of the investigators, they would have created that -- those memos anyway, the law is clear that that's not work-product. That's -- that is just investigative materials, factual materials that are not subject to protection.

So I don't think either as, you know, it may be that there are communications for the purpose of providing -- confidential communications for the purpose of providing legal advice that are among the materials we've requested.

We don't want those, but I don't think that the underlying -- the documents that were gathered, the -- and the interviews that were conducted were either subject to the attorney-client privilege or work-product protection.

THE COURT: But also argue law enforcement privilege and deliberative process.

MS. TRZASKOMA: Well, again, I think where here where the part of the problem with law enforcement privilege is that the Attorney General has made a disclosure of information at a time --

THE COURT: Does that -- does that choice to disclose part mean the whole is now waived?

MS. TRZASKOMA: I think that the choice to disclose many parts does call into question whether there's a legitimate law enforcement reason to protect those materials.

And as Ms. Glavin said, this idea that, you know, in

order to obtain cooperation of witnesses, the Attorney General had subpoena power. Witnesses were obligated to come in and talk to them.

THE COURT: Subpoena power does not mean establishing trust.

MS. TRZASKOMA: Well, I get that, but I don't know on what basis the Attorney General investigators, who are in the process of conducting an investigation, that by statute has to be, the findings have to be reported publicly, on what basis could one of those investigators have said to a witness under no circumstance will we -- you know, we will keep your information, your identity totally confidential.

How can an investigator who is charged with making a public report of the findings of the investigation give such assurances or even promises we heard, promises?

And I don't think that it was -- I really do not think that to the extent witnesses were assured that their information would not be made public, that it was specifically to keep their identities from Governor Cuomo.

MS. GLAVIN: And on that point, if it would be helpful and I could put this in a supplemental letter, but I think there's a really good example of this.

Out of the 41 transcripts that were released, so they came out in three tranches. The first tranche was November 10th. That was the 11 complainants and the (indiscernible),

okay? That was the first tranches that was released.

The second tranche was November 28th. That tranche had a number of staffers that worked for the Governor.

And then, the third tranche that was released I call that sort of the grab bag and I also call it the exculpatory release, but the A.G. can disagree with me. Take a look if Your Honor, and I can cite to this, there's one witness that was interviewed, his name is Matthew McGrath. He's the ex-husband of one of the complainants, Alyssa McGrath.

He was interviewed under oath. And what he says to the Attorney General's Office, is this going to be confidential because he's concerned about his ex-wife, who's a complainant in the case.

And they're saying, well, we're going to try and keep this confidential. And they just blasted that transcript out. And I don't think they told Mr. McGrath it was coming on January 20th. He's unrepresented by counsel.

And the Attorney General's Office chose not, as far as I know, maybe they did, I'd like to get the memo, but what he had to say was incredibly exculpatory of Governor Cuomo as it related to two of the complainants, which was Alyssa McGrath and Britany Commisso, who were accusing the Governor of sexual harassment.

He talked about how Alyssa McGrath expressed nothing but absolutely devotion to the Governor, had his photo, a

collage of photos that she had with him next to her bed.

And that he never heard her complain in any way, shape, form, nor Ms. Commisso. That's someone with material exculpatory evidence, you know, that we would want to use in the case.

But his concern was not Governor Cuomo. His concern was Ms. Commisso and Ms. McGrath, and you know, how this might impact his relationship with his ex-wife. They have a child.

And the Attorney General indicated to him we'll keep it confidential until they didn't and released it to the world. So the confidentiality argument to say it's, you know, to keep it from Governor Cuomo just doesn't hold water.

The other aspect, Your Honor can do, because we do -- you do it routinely in cases with the government. To the extent things should be on an attorney eyes only in the first instance, and then if we believe that there was information in there that we need to discuss with him, because he will be able to assist with his defense, then we can come Your Honor and talk about that.

But we're willing to take to the extent some of this stuff should be attorneys' eyes only, we're willing to do that, too. We just want to be able to defend against the allegations and be able to assert defenses that we know are there with witnesses and evidence that we know exist.

And so, what I would propose for us to do is I can do

a follow up. We can to a follow up letter with Your Honor. And I think what we can do is on the interview memos, I can provide some more information about that, which I think once the Court takes a look at it, I think you can think about it as it goes to burden.

With respect to specific documents out of 79,000, or 73,000, I'd like to have further engagement with the A.G.'s Office about those categories.

And in addition with respect to the four documents that they're proposing that they would provide with Trooper 1's name on it, just say why are we beating around the bush? What are those documents that just have a her name on it? Will you identify for us for instance the other troopers who are witnesses or not witnesses to events or, you know, the atmosphere and how the Governor treated the state troopers?

See if we can have a discussion with them about the 79,000 or 73,000, what the categories are, and come back to you.

If we can't come to an agreement, but we come into this in good faith, if we can't come to an agreement, I will go through the complaint with each of these incidents based on my knowledge of the case and, you know, records I think I'm pretty sure exist will be helpful. And then come up with a subset for Your Honor to consider.

MR. ANDRES: Your Honor, if I could just -- I'm happy

to let you go away --

THE COURT: I certainly want to hear what your --

MR. ANDRES: -- but at some place about a half hour ago, we moved from the civil subpoenas to criminal law. And now, we have an explicit request for 3500 material.

MS. TRZASKOMA: No. I did not --

MR. ANDRES: And to the extent - excuse me. Excuse me. To the extent that said earlier that the biggest mistake you could make would be to not apply General Electric, I revise that.

The biggest mistake that you could make in this case is to apply some sort of 3500 material requirement because it's easier for them.

I mean, these arguments border on the frivolous. And it just is not -- there is no Brady requirement. I won't speak for the A.G.'s Office. There's no 3500 material. They're not entitled to prior statements of these witnesses.

And literally for a half hour now, we have been off track. So with that, I'll -- that's all I wanted to say, but it's sort of stunning to sit here and say I'm not (indiscernible). I knew they wanted 3500 material. They've been talking about, but they actually said it.

THE COURT: I of course noticed that, Mr. Andres. And I did not take it as 3500 material explicitly, but as shorthand for the type of exculpatory information that they

think may be in the files.

MR. ANDRES: Well, then we should look at the transcript to see what they said, because they specifically have asked for 3500 material and witness statements.

MR. AMER: I also -- thank you, Your Honor. We're heading down the wrong path with this suggestion about wanting meet and confers.

I don't understand what Mr. McGrath and his divorce has to do at all with Trooper 1. It has nothing to do with Trooper 1.

Why are they entitled to this material? They're not. It's not about this case and their defense of the claims in this case. It's about their interest and desire and ease and convenience.

And none of that is relevant. And I can assure you that Cleary, although they're you know still under the appointment, they're not pro bono. And it's going to be very expensive and it's going to take thousands of hours. And the burden shouldn't be on us. It should be on them.

They should do the work they need to do to defend the case and they shouldn't be allowed to just try and piggyback on the work that our office did in an investigation that was far more broad, far more encompassing, dealt with 11 different witnesses.

And what Mr. McGrath had to say about other people

and his divorce and any exculpatory information he may have about his ex-wife, who cares? How does that at all impact Trooper 1? It doesn't. And so, that's the problem we have here.

THE COURT: Well, I understood that argument to be a response to your representation that the witnesses are promised confidentiality and that the main concern was disclosure to the Movant himself.

So I think that's how Ms. Glavin intended that argument. I think it was a response to something you had said previously today, but it's really neither here nor there because I do hear you, both of you, that you think that you are entitled to sovereign immunity and all of this is wrong headed.

If I were not to so conclude, however, that you were entitled to sovereign immunity as to the Attorney General in particular, what do you make of the specific request for documents that you have in your possession as a result of gathering them and the investigation that are not work-product? Blackberry pin messages email dumps, things along those lines?

MR. AMER: Certainly as I mentioned with the pins, those are more readily available from a party. It's, you know, it's black letter law that if you can get discovery from a party, that's the -- where you should get it from. And you should not impose a burden on a nonparty to get the same material that you can get from a party.

So they have the ability to subpoena the New York State Police Department and seek to obtain through party discovery some of this material.

I don't know what they have and what they don't have or what they would say in response, but it just seems to me that that's an easy one. They have a party in the case that has the information that they're seeking.

And you know, the interview memos, I think they're just totally off-base. I mean, that's classic work-product. They shouldn't get to see the mental impressions of the lawyers, who were appointed as special deputies in this case. They're not entitled to it. They shouldn't get it.

THE COURT: I think they've acknowledged that they aren't entitled to the impressions, but to the extent to the interview memos are so and so stated the following, so and so further stated the follow, are those mental impressions or are those facts?

MR. AMER: Well, I think to the extent that they reveal the questioning, that's work-product. You know, you're not entitled to that. And not to mention the fact they have the actual transcripts of the people who testified under oath.

THE COURT: Okay, so I do hear, Mr. Andres, that we're a little off-track, talking about 3500 material, although I did understand it to be shorthand for exculpatory material if that's what you meant, Ms. Glavin.

MS. GLAVIN: I did mean it as such. It's --

THE COURT: Okay, and --

MS. TRZASKOMA: And prior --

MR. ANDRES: How is anything with exculpatory material, there's no Brady obligation. It's --

THE COURT: There's no Brady obligation. The question is whether or not they can obtain the discovery from another source or whether or not this information exists in the world. They may be entitled to it if privileges and sovereign immunity don't apply, which are major hurdles in terms of the analysis.

MS. TRZASKOMA: Yeah, just very briefly on that. I mean, in any civil case, if I know that a relevant witness in the case I'm litigating gave prior testimony, made prior statements, I would go get those statements. So --

THE COURT: If you could.

MS. TRZASKOMA: -- if I could. And I would do everything in my power to get those prior statements.

So there happens to be a statute in the criminal law that, you know, requires the government to disclose that, but that's exactly what Rule 45 subpoenas are for. Discovery is broad.

And you know, I think to Mr. Amer's point about, oh, just go ask the New York State Police, again, it's very focused on Trooper 1, which I get. It would be great if that's half

the complaint were gone, but we have 11 -- 10 other complainants. They were not employees, some of them weren't state employees at all. Many of them weren't -- no other complainant was an employee of the New York State Police.

So what, we're going to go through this again? We're going to subpoena the executive chamber? We're going to get the sovereign immunity argument again?

There is one place, there is one agency that has these materials or two agencies. There's no reason we need to go serve 100 subpoenas to get what is most efficiently obtained from the Attorney General and the Judiciary Committee.

THE COURT: So --

MS. TRZASKOMA: So I --

THE COURT: I fully understand the arguments. And I appreciate all of you spending this much time.

Mr. Andres, is there something finally you wanted to add?

MR. ANDRES: Nice to see you, Judge. Thank you for your time.

THE COURT: Thank you for your time. Nice to see you all. Thank you, Mr. Amer, for your excellent argument and your briefing.

And thank you, of course, to the Movant's attorneys as well. I thought the case was very well briefed. I truly did not expect this last three hours, but thank you all for

your patience.

MR. AMER: Thank you, Your Honor.

MS. GLAVIN: So just following up, what I suggested make sense is to follow-up status letter.

THE COURT: I mean, to the extent Mr. Amer's willing to engage, I certainly would not oppose hearing an update that the parties have narrowed the gap between them, but you know, I'm not going to order that at this juncture in light of the arguments that have been raised by both sides.

MS. GLAVIN: Okay, so I -- what we'll do if it's okay with the Court is we will submit a follow up letter. We'll endeavor. We'll submit a follow up letter and break it down I think a little bit more and give you some examples.

THE COURT: And if you are intending to do that, I assume you guys would want to have some sort of a response if there -- if the letter does not evident agreement. Is that fair, Mr. Amer?

MR. AMER: Sure, yes.

THE COURT: Okay, what time frame are you thinking, Ms. Glavin?

MS. GLAVIN: Could we all confer on our schedules because I'm away the next couple of weeks? Would it be possible if we come up with a schedule amongst us and submit to the Court? Because I just don't know what Ms. --

THE COURT: That's fine, but I'm not ordering the

A.G. to talk to you. So if they choose to talk to you --

MS. GLAVIN: You don't --

THE COURT: -- and they choose to try to narrow the gap, and you provide me with an update, that would be welcome.

And there a scheduling order of a sort would also be welcome.

MS. GLAVIN: Yeah.

THE COURT: But you know, in light of the issues raised, at this juncture, I'm not going to order it.

MS. GLAVIN: No, no, no, you don't have to order them --

THE COURT: Okay.

MS. GLAVIN: -- it's fine. We'll confer with them as to just sort of timing on us to submit something and if they want a response. Not that they have to have a substantive discussion. Mr. Amer and I will exchange pleasantries.

THE COURT: Yes.

MS. GLAVIN: Okay.

THE COURT: But Mr. Amer, when can you disclose the four documents you've agreed to provide?

MR. AMER: So we are waiting for a protective order to be put in place that would apply to any production from our office.

Our understanding of the current status is there's a protective order, but no mechanism for nonparties to designate

--

THE COURT: I see, okay.

MR. AMER: So --

THE COURT: So when there is a protective order in place in a case, do we need to do something to the protective order, some sort of amended protective order?

MS. TRZASKOMA: I mean, I think we could -- we're happy to speak with Mr. Amer to figure out what additional language he needs.

THE COURT: Okay.

MS. TRZASKOMA: -- in the protective order.

THE COURT: All right, and you know, I would you know, welcome your filing on that at any time. And hopefully, we could get that resolved quickly, so that you can get these documents that may further narrow your gap in terms of what you're looking for.

MR. AMER: Yeah, they just need to be reviewed for redaction, but it's only 1- to 200 pages, so I don't think that's the issue. It's just getting in place something that would allow us to designate the material as confidential.

THE COURT: Okay, understood. Yeah, that we do have a protective order in the case and if we need to add you as a party, an addendum something --

MR. AMER: Not as a party.

THE COURT: Not as a party. A party to the

protective order.

MS. TRZASKOMA: Yes.

THE COURT: All right, thank you all.

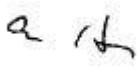
MR. AMER: Thank you.

MS. TRZASKOMA: Thank you very much.

(Proceedings concluded at 2:12 p.m.)

CERTIFICATE

I, Chris Hwang, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.



_____ February 13, 2023

Chris Hwang Date

Court Reporter